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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 915

FEDERAL POWER COMMISSION, PETITIONER

vs.

METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 1, 1938
CERTIORARI GRANTED APRIL 28, 1938

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SUPREME COURT OF THE UNITED STATES

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FEDERAL POWER COMMISSION, PETITIONER

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METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In United States Circuit Court of Appeals for the Third Circuit

No. 6447. Petition for a Stay

IN THE MATTER OF THE APPLICATION OF METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, AND SOLAR ELECTRIC COMPANY, PETITIONERS

Petition for rule to show cause and for stay of proceedings

Filed April 21, 1937

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The Petition of Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company respectfully shows to this Court and states that:

1. Said petitioners, and each of them, are corporations duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania and are engaged in the business of the generation and/or transmission and/or sale of electric energy
2 within said Commonwealth; and the principal place of business of each of the petitioners is located within the Third Circuit of the United States Circuit Court of Appeals.

2. The Federal Power Commission is a Federal administrative body created by Act of the Congress of the United States and is composed of Frank R. McNinch, Chairman, Basil Manly, Herbert J. Drane, Claude L. Draper, and Clyde L. Seavey, who are individually and as such Commissioners hereinafter sometimes collectively referred to as the "Federal Commission."

3. Heretofore, and on the 6th day of January 1936, said Federal Power Commission made a certain order entitled by said Commission—"Order of Inquiry and Investigation of Metropolitan Edison Co. et al." (Docket No. IT5015), by which said order said Commission purported to institute an inquiry and investigation with respect to the petitioners herein, who were designated in said order as "respondents."

4. Said order of January 6, 1936, further recited certain representations by the Governor and the Public Service Commission of the Commonwealth of Pennsylvania (hereinafter referred to as the "Pennsylvania Commission"), which representations purported to be constituted of matters developed in the course of an inquiry by the Public Service Commission of Pennsylvania prosecuted with respect to the petitioners herein and others. Said inquiry and investi-

gation instituted by the Federal Commission's said order of January 6, 1936, was so instituted at the instigation of the Governor and the Pennsylvania Commission, and was so instituted as an investigation ancillary to and in aid of the inquiry and investigation then being carried on by the Pennsylvania Commission against petitioners and others.

3 5. The inquiry and investigation instituted and carried on by the Pennsylvania Commission against petitioners and others related and now relates to the local and intrastate affairs of petitioners and has for its purported object the enforcement of the Public Service Law of the Commonwealth of Pennsylvania and the imposition of penalties against petitioners for alleged violations of the Pennsylvania law.

6. The petitioners have filed returns or answers to the Federal Commission's said order of January 6, 1936, challenging the jurisdiction and power of the Federal Commission to make said order in the premises and reserving all rights of every kind to question the legality of said order and the authority of said Commission to make the same. Said returns or answers further responded to the Commission's said order of January 6, 1936, and furnished various data and information.

7. Thereafter, by an order made on March 6, 1936, the Federal Power Commission accepted the Pennsylvania Commission's offer of the services of certain of its accountants, including one J. A. Wilhelm, to act as examiners and/or investigators for the Federal Commission, without compensation, and by said order of March 6, 1936, said Wilhelm and others were designated as examiners of the Federal Commission to assist in the conduct of the investigation which was then proceeding pursuant to the aforesaid order of January 6, 1936.

8. Thereafter, an examination of books and records of petitioners was made and a so-called report was purportedly made therefrom prepared by two of the Federal Power Commission's examiners, to wit: said J. A. Wilhelm, regularly in the employ of the Pennsylvania Commission and paid by it, and Harry L. Osman, and said report, dated December 10, 1936, was presented to the

4 Federal Commission. Said report purports to contain matters of fact found by the Federal Power Commission's examiners, various conclusions of said examiners, and their recommendations thereon.

9. Following the making of the aforesaid report, the Federal Commission made an order, dated January 26, 1937, fixing a hearing to be held on March 3, 1937, in the Commission's Hearing Room in Washington, D. C., and further requiring that petitioners (respondents named in said order) and thirty-five other persons, firms, and corporations appear at said hearing and produce various books, papers, and records. Said order contained further a notice that the matters assigned for hearing thereunder would be heard by the Federal Commission sitting jointly with the Pennsylvania Commission.

10. The Federal Commission's said order of January 26, 1937, was in furtherance of the inquiry and investigation instituted by its said order of January 6, 1936, and was an order which under the terms of the Federal Power Act constrained the Petitioners herein to obedience thereto, under penalty, unless annulled or suspended by the Federal Power Commission or by judicial decree on review of said order.

11. The petitioners, believing themselves to be aggrieved by the order of January 26, 1937, and by the investigation instituted by the order of January 6, 1936, as to the legality of which and the jurisdiction and power of the Commission to make the same, the right to object had been reserved as hereinabove set forth, thereupon sought to obtain a Court review of said order.

12. The provisions of the Federal Power Act (Section 313) require, as a condition precedent to the obtaining of a Court review of any order of the Commission by a person aggrieved thereby, that
5 such person apply to the Commission for a rehearing upon any such order, within thirty days after the issuance thereof, setting forth specifically the grounds upon which such application is based. The Federal Power Act further provides that following the within sixty days after the order of the Federal Power Commission upon the application for rehearing, the order of the Commission as to which the person is aggrieved may be reviewed by the Circuit Court of Appeals of the United States for the Circuit wherein such persons is located or has its principal place of business; and that no objection to the order of the Commission shall be considered by the Court unless such objection shall first have been urged before the Commission in the application for rehearing.

13. Therefore, the petitioners, in order to obtain a review by the appropriate appellate court of the Commission's said order of January 26, 1937, filed with the Federal Power Commission, on February 23, 1937, within the time prescribed by the Federal Power Act, a Petition for Rehearing, in which Petition petitioners prayed (a) that a rehearing be granted, (b) that upon such rehearing the Commission vacate its order of January 26, 1937, and terminate the proceedings purported to be instituted by its order of January 6, 1936, and (c) that pending the disposition of such Petition all further proceedings be stayed and suspended. A true and correct copy of said Petition for Rehearing and the exhibits annexed thereto so filed is annexed hereto and marked "Exhibit A." Said Petition for Rehearing and exhibits annexed contains in full text the Commission's said orders of January 6, 1936, and of January 26, 1937. Subsequent to the filing of the Petition for Rehearing and, on February 24, 1937, the Federal Power Commission made a further order reciting the filing of the Petition for Rehearing with respect to the order of January 26, 1937, and
6 reciting further the application of the Governor of the Commonwealth of Pennsylvania for a postponement of the hearing set by said order, and ordered that such hearing, set for March 3, 1937, be continued without day.

14. By notice dated March 24, 1937, counsel for petitioners were informed that the Petition for Rehearing had been granted by the Commission and that a hearing thereon had been fixed for April 14, 1937, at the Commission's Hearing Room in Washington, D. C. Said notice in its full text is as follows:

"Notice is hereby given that the Federal Power Commission, on March 23, 1937, granted the petition for rehearing, filed in the above matter by the respondents, Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, and assigned the matters involved in this proceeding for hearing in the hearing room of the Commission in Washington, D. C., on the 14th day of April 1937, at 10 a. m.

"By the Commission:

"LEON M. FUQUAY, *Acting Secretary.*"

15. The petitioners and their counsel assumed, on the receipt of this notice, that the Petition for Rehearing had been granted, that the hearing to be held on April 14, 1937, of which notice was given, was to be a hearing relating solely to the objections raised by the petitioners in their Petition for Rehearing, and did not assume that the Commission would attempt to proceed with the matters purportedly to be investigated pursuant to the orders of January 26, 1937, and January 6, 1936, and assumed further that the word "proceeding," as used in the statement contained in the notice of hearing that
7 the Commission had "assigned the matters involved in this proceeding for hearing," referred, not to the matters involved in the entire investigation under said order of January 26, 1937, which was objected to, but solely to the matters of objection raised by the Petition for Rehearing.

16. The jurisdiction and powers of the Federal Power Commission are prescribed and limited by the Federal Power Act. Title II of said Act is applicable only to "public utilities" as defined therein. A "public utility" is defined as a "person who owns or operates facilities subject to the jurisdiction of the Commission under this Part" (Federal Power Act, Sec. 201 (e)). Under Section 201 (b) of the Federal Power Act the provisions of Part II thereof apply only to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, and confer on the Commission jurisdiction only over facilities for such transmission or sale of electric energy. Three of the petitioners, to wit: Erie Lighting Company, Solar Electric Company, and The Clarion River Power Company, are not such "public utilities," as defined in the Federal Power Act, and claim that accordingly the Federal Power Commission is without jurisdiction to conduct any inquiry and investigation into their affairs or to make any order directed to them made in the course of any such purported investigation. This objection is specifically raised by the Petition for Rehearing, Exhibit A.

17. The Federal Power Commission's order of January 6, 1936, purporting to institute said inquiry and investigation of petitioners,

purports to be directed to an investigation of contracts and working arrangements between petitioners and any person who controls, directly or indirectly, the petitioners or who is controlled by any such
8 person, as well as charges paid or obligations incurred thereunder. The petitioners claim that the Commission is without jurisdiction, under the terms of the Federal Power Act or otherwise, to inquire into or to investigate this subject matter; that the propriety of contracts or working arrangements between petitioners and others or the reasonableness of charges thereunder is beyond the power and jurisdiction of the Commission to determine; and that particularly in the absence of a complaint with respect to contracts or working arrangements between petitioners and others, an investigation thereof is beyond the jurisdiction of the Commission, under the Federal Power Act or otherwise.

This claim and specific objection to the jurisdiction of the Federal Power Commission is plainly set forth in the Petition for Rehearing, Exhibit A.

18. The Federal Power Commission's order of January 6, 1936, purporting to institute the inquiry and investigation of petitioners, purports to be directed to an investigation of the cost to persons rendering services to petitioners, of such services. The petitioners claim that the Commission is without jurisdiction, under the terms of the Federal Power Act or otherwise, to inquire into or to ivestigate this subject matter; that the Federal Power Act contains no provision requiring that services rendered to petitioners be rendered at cost and confers no duty, power, or jurisdiction on the Commission to determine whether charges paid by petitioners for services rendered to them exceed the cost thereof to the persons rendering them; and that the investigation in this regard and any order made in furtherance of it are beyond the jurisdiction and powers of the Commission, under the Federal Power Act or otherwise.

This claim and specific objection to the jurisdiction of the Federal Power Commission is plainly set forth in the Petition for Rehearing, Exhibit A.

9 19. The petitioners further claim that the investigation purported to be instituted by the Commission's order of January 6, 1936, is not limited to facilities over which the Commission is given jurisdiction by the Federal Power Act but relates to contracts and working arrangements between the petitioners and others and charges made thereunder and the cost of services to persons supplying the same to petitioners, all of which are local matters, are not matters of interstate commerce, and are not matters the power or jurisdiction to investigate as to which is conferred on the Commission by the Federal Power Act or otherwise.

This claim and specific objection to the jurisdiction of the Federal Power Commission is plainly set forth in the Petition for Rehearing, Exhibit A.

20. The petitioners claim further that the real purpose of the investigation by the Federal Commission, pursuant to its order of

January 6, 1936, and in purported aid of which its order of January 26, 1937, was made, was to assist the Pennsylvania Commission in the prosecution of the proceedings instituted by it against petitioners and others to impose penalties for alleged violations of the Public Service Law of Pennsylvania; that the Federal Commission has no jurisdiction or power to prosecute an investigation for any such purpose; and that any order of the Federal Commission made in furtherance of an investigation carried on for any such purpose must be annulled.

This claim and specific objection to the jurisdiction of the Federal Power Commission is plainly set forth in the Petition for Rehearing, Exhibit A.

21. On April 14, 1937, the petitioners appeared by their counsel before the Federal Power Commission for the hearing set by the Commission's notice of March 24, 1937, purportedly notifying
10 petitioners that their Petition for Rehearing had been granted.

The petitioners, after being denied by the Commission the right to inspect in said hearing or otherwise the correspondence between the Governor of Pennsylvania and the Federal Commission and between the counsel for the Pennsylvania Commission and the counsel for the Federal Commission, respecting the investigation and its purposes, and after being referred to a so-called official file which it developed did not contain all of the records relating to the investigation, proceeded with the introduction of evidence. This evidence tended to establish the claim, hereinabove set forth in paragraph 16, that the petitioners Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company are not public utilities as defined by the Federal Power Act, and are not therefore subject to the jurisdiction of the Federal Power Commission, as such. The evidence adduced further tended to establish that the investigation was instituted for the purpose of supplying information to the Pennsylvania Commission for use by that Commission in proceedings against Petitioners and others relating to purely local and intrastate matters and having for their object the imposition of penalties for alleged violations of the State law. No other evidence was introduced by the petitioners because no other questions of fact were presented or were intended to be presented by the objections contained in the Petition for Rehearing, Exhibit A, the determination of which was either necessary or appropriate to a consideration or determination of the primary jurisdictional objections raised by respondents in their Petition for Rehearing. The other objections, which raise purely legal questions, are determinable by a resolution of the matters appearing on the face of the orders of January 6, 1936, and January 26, 1937, with the controlling provisions of law, and require no factual evidence whatever for
11 their determination. The petitioners have rested subject to the furnishing of certain contracts and statements requested by the Commission's counsel.

22. Thereupon, the counsel for the Federal Power Commission commenced the introduction of evidence directed neither to a deter-

mination of whether Erie Lighting Company, The Clarion River Power Company, or Solar Electric Company are public utilities as defined by the Federal Power Act, nor to the purpose of the investigation, which Commission's counsel claimed to be immaterial, but proceeded instead with the introduction of evidence wholly immaterial to the only two factual issues presented by the Petition for Rehearing. The aforementioned accounting report of Messrs. Osman and Wilhelm purporting to contain various matters of fact relating to the affairs of petitioners and others, obtaining as a result of the Federal Commission's investigation, as well as the conclusions of the Commission's examiners with respect to the purported facts, was offered in evidence and the Commission's examiner, Osman, was asked to explain and did explain two tabulations contained in said report. Counsel for respondents have objected to the introduction of such evidence as improper on a hearing held pursuant to the Petition for Rehearing and the Commission's order granting the same. Nevertheless, the Commission's examiner before whom the hearing was and is being conducted overruled the objections, although it was apparent that the Commission's counsel intended to proceed with the introduction of all evidence which might have been introduced at the hearing directed by the order of January 26, 1937, as to which a rehearing was purportedly granted by the Commission, as aforesaid.

23. At the opening of the hearing on April 16, 1937, which had been adjourned from the previous day, on which previous day
12 petitioners' objections and the examiner's ruling as to the evidence introduced and to be introduced by Commission's counsel were made, counsel for the petitioners formally restated the petitioners' objections to the introduction of evidence in furtherance of the investigation and in furtherance of the order of January 26, 1937, as to which a rehearing had been granted; and pointed out clearly, as appears by the transcript of the testimony, which will be made available to this Honorable Court, that if the Commission's counsel was permitted to proceed in the manner indicated, the only result would be the holding of the hearing directed by the order of January 26, 1937, under the guise of granting a rehearing upon the petitioners' Petition for Rehearing, that thereby under such guise of granting petitioners' Petition for Rehearing filed for the purpose of obtaining a Court review of the Commission's order of January 26, 1937, the very matters complained of and objected to by the Petition for Rehearing would be proceeded with, and that petitioners would be effectively thwarted in their efforts, and would be denied the opportunity to review by this or any other Court. Petitioners' counsel thereupon requested the examiner to certify to the Federal Power Commission a request to define the issues to be determined by the examiner on the Petition for Rehearing, and to instruct its own attorneys that no evidence in furtherance of the orders of January 6, 1936, and January 26, 1937, be introduced on the hearing on the Petition for Rehearing; and requested that no proceedings be taken pursuant to said orders until the question of the right of the Commission to make the orders be determined; and requested that the

proceeding before the examiner be stayed pending the reference of the requests to the Commission; and that counsel for petitioners be permitted to be heard by the Commission on the reference. In support of the aforesaid request, counsel for petitioners stated
13 fully and clearly, as appears by the minutes of testimony, the reasons sought to be urged before the Commission for requiring the exclusion of evidence in furtherance of said order of January 26, 1937, on this rehearing by which a review of that very order was and is sought.

The examiner declined to certify the request to the Federal Power Commission and proceeded to make a determination of the request which he was asked to certify to the Commission for its determination.

24. The examiner thereupon ruled as follows:

"The Examiner will state now that, considering the searching nature of the petition that has been filed here, its factual allegations, and the other facts that he has recited, he expects to rule and does rule that Commission's counsel here may introduce evidence touching matters appearing on the books of the respondent corporations, evidence relating to the affiliation of the respondent public utilities with other electric utilities and with companies whose charges appear on the books of the public utility respondents in this proceeding, and with relation to such charges; as well as to the business operation, contracts, and records of respondents [is] if that will aid in determining the jurisdictional questions here raised. That is the ruling of the Examiner."

25. This ruling of the examiner, as above set forth, made plain that it was and is the purpose of said examiner to permit counsel for the Federal Power Commission to proceed with the investigation and with the introduction of evidence in furtherance thereof and in furtherance of the order of January 26, 1937, under the guise of a rehearing upon said order, despite the fact that the hearing set by said order had been adjourned without date. It
14 was further made plain that the examiner neither had nor has any intention of affording to petitioners the opportunity of a review of said order of January 26, 1937, but that under the guise of granting a hearing in connection with the review sought by them, any opportunity of the petitioners to obtain a determination of the power of the Commission to make the order complained of and to carry on the investigation in aid of which it was made, is to be effectively denied.

26. In a further effort to have this important fundamental matter referred to the Federal Power Commission for decision by it, counsel for petitioners requested that the examiner certify his ruling as to the scope of the hearing to the Commission. The examiner overruled this request.

27. The hearing proceeded and counsel for the Commission introduced evidence, all of which was in furtherance of the order of January 26, 1937, and of the investigation in the aid of which said

order was made. Said hearing on April 16, 1937, was then adjourned to 11 A. M. on April 19, 1937.

28. Prior to the opening of the hearing on April 19, 1937, the petitioners herein presented a petition to the Federal Power Commission reciting the requests theretofore made to its examiner, as set forth in paragraphs 23, 24, and 26 hereinabove, and setting forth the ruling of said examiner and praying for a determination of said requests by the Federal Power Commission itself. A copy of said petition is annexed hereto, marked "Exhibit B," and made a part hereof.

29. At the opening of the hearing on April 20, 1937, pursuant to continuance of the hearing on April 19, 1937, the Commission's Examiner announced the ruling of the Commission upon the
15 petition to the Commission referred to in the preceding paragraph hereof. The Commission's ruling was as follows:

"The Commission having considered the allegations contained in the petition of respondents, entitled 'Petition of Respondents for an Adjudication in respect to the Petition for a Rehearing filed February 23, 1937,' this day offered for filing, finds that the same relates to matters now delegated by this Commission to the Trial Examiner in charge of the hearing in the above-entitled matter; that the rules of practice and regulations of the Commission do not provide for the method of interim review of the Examiner's rulings attempted by the offer to file the said petition, and the petition is therefore referred to the Examiner for disposition by him."

The Examiner thereupon ruled as follows:

"The Examiner holds, in accordance with the Commission's ruling, that the petition offered for filing on yesterday morning by the respondents cannot at this time be entertained by the Commission or the Examiner under the rules of practice and regulations of this Commission; and further, that the rights of the respondents can be amply protected by the usual method of exceptions and the argument on those exceptions before the Commission in advance of any determination by the Commission of the final result of this hearing upon the respondents' petition."

30. Following the ruling of the Federal Power Commission and of the Examiner as set forth in the preceding paragraph hereof, Counsel for the Commission continued, with the sanction of the Commission's Examiner and the Commission, to proceed with the introduction of evidence in furtherance of the investigation and in furtherance of the order of January 26, 1937, as to which a court review is sought in the same manner as had been done
16 prior to the ruling of the Commission and of its said Examiner and in the same manner as hereinabove set forth in Paragraphs 22 to 27, inclusive, hereof; and the Commission, its Examiner and Counsel are proceeding and will continue to proceed with the investigation under the Commission's orders of January 6, 1936, and January 26, 1937, under the guise of a rehearing upon said order.

31. Such procedure on the part of counsel for the Federal Power Commission, sanctioned by the Commission's examiner and the Commission itself, constitutes an effective destruction of petitioners' right to a Court review of the Commission's order of January 26, 1937, as to which the Petition for Rehearing, Exhibit A, was filed.

32. Said procedure on the part of counsel for the Commission, sanctioned by the Commission's examiner and the Commission itself, prevents the orderly review by this or any other Court of the primary jurisdictional questions raised by the Petition for Rehearing, despite the fact that such objections are fundamental and go to the root and essence of the entire proceeding, and despite the fact that such objections, if sustained, will render nugatory all further proceedings and evidence which may be had or adduced as part of the Commission's inquiry and investigation directed to petitioners.

33. Such procedure on the part of counsel for the Commission, sanctioned by the Commission's examiner and the Commission itself, if permitted to continue, will require lengthy and protracted further hearings, the expenditure of a long period of time and of great effort, both on the part of the Commission and its counsel and of the respondents and their counsel, and will require the expenditure of substantial sums of money, all of which time, money and
17 effort will be wasted and expended to no purpose whatever if petitioners' fundamental objections to the jurisdiction and power of the Commission, as hereinabove set forth, and as set forth in the Petition for Rehearing, Exhibit A, are sustained.

34. Such procedure on the part of counsel for the Commission, sanctioned by the Commission's examiner and the Commission itself, presupposes the validity of the very order and investigation, the legal right to make which is questioned by the Petition for Rehearing, Exhibit A, and in so doing begs the questions involved, and not only completely waives the same aside, but at the same time effectively prevents an orderly and speedy determination of the same, in accordance with the provisions of the Federal Power Act.

35. Such procedure on the part of counsel for the Commission, sanctioned by the Commission's examiner and the Commission itself, is now resulting and will result in proceedings and action by the Commission entirely beyond the jurisdiction and powers conferred upon it by the Federal Power Act; and is now resulting and will result in an investigation into and interference with affairs and matters of and between petitioners and others, which affairs and matters are not subject to the control or jurisdiction of the Federal Power Commission under the Federal Power Act and/or of the Congress of the United States or any of its subordinate agencies under the Constitution of the United States and Article I, Section 8 and Amendment X thereof; and is now resulting and will result in the deprivation of the petitioner's rights, property, and liberty without due process of law in contravention of the Constitution of the United States and Amendment V thereof.

36. Your Petitioners aver that unless the Federal Power
18 Commission and each of the members thereof, their counsel and representatives are enjoined and restrained from continuing to conduct the hearings on the Petition for Rehearing in the manner in which they have been conducted and in the manner in which they will, as appears from the ruling of the Commission's Examiner and the procedure followed and proposed to be followed by the Commission's Counsel, continue to be conducted, the Commission under the guise of granting a rehearing to petitioners will have completed the very investigation the right and power to conduct which is questioned, and any determination of such right and power by your Honorable Court will have become moot.

37. Unless the Federal Power Commission, and each of the members thereof, its counsel, examiners and representatives, are enjoined and restrained by this Honorable Court from continuing to conduct the hearings, as aforesaid, on the Petition for Rehearing, in the manner in which such hearings have been and will continue to be conducted, as appears from the rulings of the Commission's examiner and the procedure followed and proposed to be followed by the Commission and its counsel, this Honorable Court will be effectively deprived of its jurisdiction to grant a review, under the Federal Power Act or otherwise, of the order of said Commission as to which a rehearing was sought as a condition precedent to such review; the intent of Congress in enacting in the Federal Power Act provision for review of the Commission's actions and orders will be defeated; the petitioners will be deprived of their right to obtain such review, as provided by law, and will be forced to proceed as parties to an inquiry and investigation which, for fundamental and basic jurisdictional reasons, they believe to be improperly instituted and prosecuted, without any opportunity whatever of obtaining a determination of the propriety of said inquiry and
investigation until the same shall have been concluded and its
19 improper and unlawful purposes accomplished at a time possibly long in the future; and the petitioners will be forced to expend large sums of money and much time and effort, which will be completely wasted, and the private affairs of petitioners and others will be delved into improperly and at length, without due process of law and in violation of the provisions of the Federal Power Act and of the Constitution of the United States, all to petitioners' irreparable damage and injury, and all because the Federal Power Commission is now attempting to conduct an investigation pursuant to an order, the power to make which has been duly challenged, under the guise of a rehearing incident to a review of said order by this Court.

38. Your Petitioners aver that they have no adequate remedy at law and have no remedy save by application to this Honorable Court for the relief herein prayed for.

Wherefore, your petitioners pray:

(A) For an order—

(1) Enjoining and restraining the Federal Power Commission, its members, counsel, and representatives, from taking any steps or proceedings in furtherance of or in connection with the inquiry and investigation purported to be instituted by the Commission's order of January 6, 1936, or the Commission's order of January 26, 1937, made in aid of said investigation and as to which the Petition for Rehearing, Exhibit A, was filed, until said Petition for Rehearing has been disposed of by the Commission and opportunity afforded to petitioners for a review of such disposition by this Court;

(2) Enjoining and restraining the Federal Power Commission, its members, counsel, examiners, and representatives from introducing or attempting to introduce any evidence at any hearings upon the
20 Petition for Rehearing, Exhibit A, tending to further or coming within the scope of the Commission's said inquiry and investigation and the order of said Commission dated January 26, 1937;

(3) Enjoining and restraining the Federal Power Commission, its members, counsel, examiners, and representatives from introducing or attempting to introduce any evidence at any hearings upon the Petition for Rehearing, Exhibit A, except such evidence as may be relevant to proof (a) that Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company are "public utilities" within the terms of the Federal Power Act, or (b) that the Commission's inquiry and investigation and the orders made as incidents thereof, were not instituted, and are not prosecuted and made for the purpose of obtaining information for use by the Public Service Commission of the Commonwealth of Pennsylvania; and

(4) Directing the Federal Power Commission, its members, counsel, examiners, and representatives, to proceed with the disposition of the Petition for Rehearing, Exhibit A, and the hearings to be had on said petition, without further efforts to proceed with its purported inquiry and investigation under the guise of a rehearing.

(B) For an order directing the Federal Power Commission, its members, counsel, examiners, and representatives to show cause before it at a time and place to be fixed in said Order to Show Cause why an Order should not be made, as prayed for in Subdivision (A) of this prayer for relief;

(C) That pending the hearing and determination of this Petition, this Honorable Court temporarily enjoin and stay all proceed-
21 ings on the part of the Federal Power Commission in connection with its purported inquiry and investigation and upon the Petition for Rehearing, Exhibit A;

(D) For such order and further relief as this Honorable Court may deem just and proper in the premises.

METROPOLITAN EDISON COMPANY,
NORTHERN PENNSYLVANIA POWER COMPANY,
PENNSYLVANIA ELECTRIC COMPANY,
ERIE LIGHTING COMPANY,
THE CLARION RIVER POWER COMPANY,
SOLAR ELECTRIC COMPANY,
By WALTER BIDDLE SAUL,
Counsel for Petitioners.

SAUL, EWING, REMICK & SAUL,
2301 Packard Building, Philadelphia, Pa.
TRAVIS, BROWNBACK & PAXSON,
61 Broadway, New York, N. Y.,
Attorneys for Petitioners.

22 [*Duly sworn to by Walter Biddle Saul; jurat omitted in printing.*]

23 *Exhibit A to petition*

Before the Federal Power Commission

Docket No. IT5015

IN RE: METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, SOLAR ELECTRIC COMPANY

Petition for rehearing

To the Federal Power Commission:

The Petition of Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company for a rehearing with respect to the Order of the Federal Power Commission made herein on the 26th day of January, 1937, respectfully represents that:

First. The exact legal names and post office addresses of the petitioners are as follows:

Metropolitan Edison Company, 412 Washington Street, Reading, Pa.

24 Northern Pennsylvania Power Company, 207 Main Street, Towanda, Pa.

Pennsylvania Electric Company, 222 Levergood St., Johnstown, Pa.

Erie Lighting Company, Erie, Pa.

The Clarion River Power Company, 222 Levergood St., Johnstown, Pa.

Solar Electric Company, Brookville, Pa.

Second. The names and post office addresses of your petitioners' attorneys to whom all correspondence with regard to this petition should be addressed are as follows:

Saul, Ewing, Remick & Saul, 2301 Packard Building, Philadelphia, Pa.

Travis, Brownback & Paxson, 61 Broadway, New York, N. Y.

Third. All of the petitioners are corporations duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania and are engaged in the business of the generation, and/or transmission and/or sale of electric energy within said Commonwealth.

Fourth. This petition is made for a rehearing with respect to a certain order made herein by the Federal Power Commission (hereinafter referred to as the "Commission"), on January 26, 1937, and for the vacation of said order on the following grounds:

25 (1) that said order was made in pursuance and as part of an investigation heretofore instituted by the Commission and now being prosecuted by it, relating to solely local and intrastate matters, and instituted and prosecuted for the sole purpose of supplying information to the Public Service Commission of the Commonwealth of Pennsylvania (hereinafter sometimes referred to as the "Pennsylvania Commission"), to assist the Pennsylvania Commission in the prosecution of certain proceedings instituted and now being prosecuted by it, relating to solely local and intrastate matters, and having for their object the enforcement of Pennsylvania statutes, and rules of the Pennsylvania Commission, and the imposition of penalties prescribed by the laws of the Commonwealth of Pennsylvania;

(2) that the Commission is without jurisdiction of the petitioners herein in the premises;

(3) that the Commission is without jurisdiction of the subject matter of said investigation;

(4) that said investigation and said order invade the rights of petitioners guaranteed to them by the Constitution of the United States;

(5) that said order is not authorized by the Federal Power Act;

(6) that if said investigation and said order are authorized by the Federal Power Act, then said Act is in violation of the Constitution of the United States;

all as more fully hereinafter set forth.

Fifth. During the months of August, September, and October 1935, proceedings were instituted by the Pennsylvania Commission against petitioners and Penelec Water Company, Johnstown Fuel Supply Company, Reading Coach Company, and Reading Street Railway Company. Said proceedings were instituted by rules or

26 orders of the Pennsylvania Commission and related and relate solely to the local and intrastate affairs of petitioners and the other persons to whom said proceedings were directed. Said rules or orders required, inter alia, that cause be shown why penalties provided by the laws of the Commonwealth of Pennsylvania should

not be imposed upon petitioners, in said proceedings for alleged violations of the laws of said Commonwealth. Returns were duly filed by the persons against whom the rules or orders were directed, including petitioners, and the Pennsylvania Commission thereupon proceeded to make examinations and to hold hearings. Said proceedings so instituted by the Pennsylvania Commission continue to be pending and are now being prosecuted by it.

Sixth. Prior to January 6, 1936, the hearings in the aforesaid proceedings by the Pennsylvania Commission were adjourned, and certain representations were made by or on behalf of the Pennsylvania Commission and the Governor of the Commonweath of Pennsylvania to this Commission, and the aid of this Commission was enlisted to secure information to assist the Pennsylvania Commission in the enforcement of said Pennsylvania statutes, the rules of said Pennsylvania Commission, and the penalties involved in the proceedings pending before it and in its investigation relating to the local and intrastate affairs of petitioners and the other persons against whom its proceedings were pending. The Commission's official Press Release No. 20, dated November 26, 1935, announced that the previous week the Pennsylvania Commission had opened its said proceedings, and that, acting on the request of the Governor of Pennsylvania and the Pennsylvania Commission, this Commission would give its full cooperation "in obtaining certain information sought by the Pennsylvania Commission" in connection with its aforesaid proceedings. A copy of said Press Release No. 20 is
27 hereto annexed, marked "Exhibit A" and made a part hereof.

Seventh. This Commission thereupon on the 6th day of January 1936, claiming to act in pursuance of its powers under the Federal Power Act and, in particular, under the provisions of Parts II and III thereof, instituted, by its order dated the same day, an investigation the object of which was stated to be to determine all facts, conditions, practices, and matters regarding the ownership, operation, management, and control of petitioners, who were designated by the Commission in said order as "respondents." A copy of said order of January 6, 1936, is hereto annexed, marked "Exhibit B," and made a part hereof. Simultaneously with the making of said order, Exhibit B, this Commission announced, in its official Press Release No. 30, dated January 6, 1936, that it had entered such order, and stated that: "the Federal Commission has advised the Pennsylvania authorities that at the appropriate time the joint hearing in connection with the investigation will be held with the Public Service Commission of Pennsylvania." A copy of said Press Release No. 30 is hereto annexed, marked "Exhibit C" and made a part hereof.

Eighth. Petitioners Erie Lighting Company, Solar Electric Company, and The Clarion River Power Company are engaged in their aforesaid businesses wholly within the Commonwealth of Pennsylvania, and are not engaged in the business of transmission or sale of

electric energy in interstate commerce and neither own nor operate facilities for such transmission or sale of electric energy.

Ninth. The investigation directed to be instituted by the Commission's order, Exhibit B, was so instituted and has been and is now being prosecuted for the purpose of securing information
28 for the Pennsylvania Commission in the hereinabove described proceedings involving petitioners and others then and now pending before the Pennsylvania Commission.

Tenth. Pursuant to the direction of the Commission's order, Exhibit B, petitioners filed answers reserving their rights to question the validity of said order and the jurisdiction of the Commission in the premises, and furnished certain statements, contracts, data, and information, and made their books and records available to the Commission.

Eleventh. Since the filing of petitioners' answer, the Commission caused an investigation to be made of various books, records, accounts, and data of petitioners and other persons.

Twelfth. A Report (hereinafter referred to as the "Report") was made to the Commission, signed by two examiners, Harry L. Osman and J. A. Wilhelm. The Report is dated December 10, 1936. Said J. A. Wilhelm is regularly in the employ of the Pennsylvania Commission and was engaged in the aforesaid proceedings by the Pennsylvania Commission against respondents and others, which have been pending since prior to the making of the order, Exhibit B, to enable the Pennsylvania Commission to obtain information for the purposes herein alleged through the medium of an investigation conducted for it by this Commission. Said Wilhelm and other employees of the Pennsylvania Commission were deputized as examiners for this Commission to facilitate said investigation and further such purposes, and petitioners are advised that all but two of the examiners designated by the Commission as authorized by it to conduct such investigation were and are regular employees of the Pennsylvania Commission.

29 Thirteenth. The report concludes that various persons are "persons under the dominant control and management of the same persons who control respondents." The respondents referred to in said Report are the petitioners herein. The Report further concluded that full and complete records, books, accounts, memoranda, and correspondence of all such persons must be examined by representatives of the Commission, and the results of such examination made available to the Commission before it can determine (a) whether the contracts, working arrangements and practices as well as charges therefor which are paid by petitioners to the persons designated in said Report as "persons under the dominant control and management of the same persons who control respondents" are reasonable and proper; (b) whether the charges paid by respondents exceed the cost of the service rendered by such persons; (c) whether such contracts, working arrangements and practices violate the Federal Power Act, as amended, or any rule or regulation of the Federal

Power Commission issued pursuant to the authority of such Act; or (d) whether such contracts, working arrangements and practices or charges therefor warrant the adoption of rules or the issuance of orders by the Commission relating thereto.

Fourteenth. On January 26, 1937, the Commission adopted an order herein reciting the making of the Report and directing that a hearing be held at 10 A. M. on March 3, 1937, in its Hearing Room in Washington, D. C., to ascertain and determine all facts, conditions, practices and matters regarding the ownership, operation, management and control of petitioners; and all contracts and working arrangements between petitioners and any person who controls, directly or indirectly, the petitioners or who is controlled by any such person, and all expenditures and obligations incurred
30 thereunder that in any way affect or relate to the business of petitioners. Said order further directs that thirty-nine persons, including petitioners, appear at said hearing and present thereat for the record for the years 1934, 1935, and to date—

"* * * full and complete information as to the person or persons which controlled, directly or indirectly, the respondents or either of them and any of the persons named above controlled, directly or indirectly, by such person or persons; and, to assist the Commission in determining the facts as to the control of each person named above, each such person is directed to present specific information and data at said hearing showing: (1) The form of its organization, i. e., whether individual, partnership, corporation, trust, or otherwise, under which such person exists; (2) the articles of incorporation, partnership, agreement, trust agreement, and/or any other document or documents by which such person was created, formed, exists or operates, as originally created and as subsequently changed, modified, amended or otherwise altered; (3) the full name and address of each partner, director, officer, trustee, agent, or other individual elected, appointed or authorized to act for such person under any circumstances whatsoever; (4) the ownership or interest, legal or beneficial, held by such persons, or any of them, in or over any other person named above, as well as the manner or means by which such ownership or interest is accomplished and/or maintained; and (5) such other and further pertinent data or information relating to the matters under investigation, as may from time to time during the course of said hearing, be required by the Commission."

Said order further directs that a copy of the Report be served upon each person directed to appear at the hearing so ordered for March 3, 1937; a copy of said order of January 26, 1937 is hereto annexed, marked "Exhibit D" and made a part hereof.

31 Fifteenth. The order, Exhibit D, contains at the foot thereof a notice that the matters assigned for hearing thereunder will be heard by this Commission sitting jointly with the Pennsylvania Commission. Immediately following the making of said order, Ex-

hibit D, this Commission, in its official Press Release No. 163, dated January 27, 1937, stated that the hearing directed to be held by the Commission's order, Exhibit D, is the result of requests by the Governor of Pennsylvania and the Pennsylvania Commission for assistance in procuring records which the Pennsylvania Commission lacks authority to obtain except through the exercise of the Federal jurisdiction, which jurisdiction the Pennsylvania Commission obviously does not possess. A copy of said Press Release No. 163 is hereto annexed, marked "Exhibit E," and made a part hereof.

Sixteenth. On or about the 28th day of January 1937 each of the petitioners received by mail from the Commission a copy of the order, Exhibit D, and a copy of the Report.

Seventeenth. On or about January 29, 1937, the petitioners Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, received by mail notices, dated January 28, 1937, from the Pennsylvania Commission. Said notices were entitled:

"The Public Service Commission of the Commonwealth of Pennsylvania v. C. 10985–10986—Pennsylvania Electric Company; C. 10987–10988—Northern Pennsylvania Power Company;
32 C. 10989–10990—Erie Lighting Company; C. 10991–10992—Solar Electric Company: C. 10993–10994—Clarion River Power Company; C. 10995–10996—Penelec Water Company; C. 10997–10998—Johnstown Fuel Supply Company; C. 10999–11000—Reading Coach Company; C. 11001–11002—Reading Street Railway Company."

Said notices are in words and figures as follows:

"Notice is hereby given that The Public Service Commission of the Commonwealth of Pennsylvania has scheduled the above entitled inquiries and investigations into the practices of the operating companies of the Associated Gas and Electric System in Pennsylvania, for further hearings in the hearing room of the Federal Power Commission on the Eighth Floor of the Carpenter Building at 10th and Case Streets NW., Washington, D. C., at 10 o'clock A. M. on March 3, 1937."

On or about the 4th day of February 1937, petitioner Metropolitan Edison Company received by mail a notice in words and figures identical to the quotation above set forth, and bearing docket numbers C. 10891–10892, 10893–10894, and 10897.

Eighteenth. The time and place designated in said notices for the hearing by the Pennsylvania Commission is the same time and place designated for the hearings ordered to be held by this Commission's order, Exhibit D. It thus appears by the aforesaid notice that the Pennsylvania Commission proposes to go forward with the aforesaid hearings before it at the hearing designated in the order of this Commission, Exhibit D, as a joint hearing. Such proceedings are so proposed despite the fact that the Pennsylvania Commission has no power or authority to act as such outside the territorial boundaries of the Commonwealth of Pennsylvania. Despite the fact

33 that the Commission has commenced no proceedings against Penelec Water Company, Johnstown Fuel Supply Company, Reading Coach Company, and Reading Street Railway Company, four of the persons against whom are pending the proceedings instituted by the Pennsylvania Commission, these four persons have also been notified by the Pennsylvania Commission of the proposed hearing in said proceeding in Washington, D. C., on March 3, 1937. Penelec Water Company, Johnstown Fuel Supply Company, Reading Coach Company, and Reading Street Railway Company are Pennsylvania corporations, respectively engaged in the businesses of furnishing water services, gas and transportation services. None of said persons is engaged in the transmission or sale of electric energy in interstate commerce or otherwise. None of said persons owns or operates facilities for such transmission or sale of electric energy. This Commission is wholly without jurisdiction of said persons.

Nineteenth. Said order, Exhibit D, is in excess of the powers of the Commission under the Federal Power Act and is made in pursuance and as a part of an investigation, to wit, this proceeding, which is beyond the powers and duties of the Commission.

Twentieth. The Commission has not been vested by the Federal Power Act, or otherwise, with jurisdiction or power to determine the propriety of contracts or working arrangements between public utilities and others, or the reasonableness of charges thereunder. The jurisdiction of the Commission under Part I of the Federal Power Act is limited to persons licensed thereunder, and under Parts II and III of the Federal Power Act is limited to facilities used in connection with the transmission or sale of electric energy in interstate commerce. No complaint whatever has been filed with the Commission with respect to any contracts or working arrangements
34 between petitioners and other persons insofar as they may affect licensees or facilities, if any, of petitioners under the jurisdiction of the Commission. Nevertheless, the Commission now seeks to support its investigation, as appears by the Report, on the basis, firstly, that it is an investigation to determine whether contracts and working arrangements between petitioners and other persons, and the charges thereunder, are proper and reasonable.

Twenty-first. The Federal Power Act contains no provision requiring that services rendered to public utilities be rendered at cost, and confers no duty, power, or jurisdiction on the Commission to determine whether charges paid by public utilities for services rendered to them exceed the cost thereof. Nevertheless, the Commission now seeks to support its investigation, as appears by the Report, on the basis, secondly, that it is an investigation as to whether the charges paid by petitioners to other persons exceed the cost to such other persons of rendering such services. The Commission is so proceeding with said investigation despite the fact that it relates to matters, as aforesaid, wholly without the jurisdiction of the Commission.

Twenty-second. The Commission now seeks to support its investigation, as appears by the Report, on the basis, thirdly, that it is an

investigation to determine whether contracts and working arrangements between petitioners and others violate the Federal Power Act, as amended, or any rule or regulation of the Commission issued pursuant to the authority of such Act. The Commission is so proceeding despite the fact that the Federal Power Act contains no provision giving the Commission any jurisdiction or power so to investigate. The Commission is so proceeding despite the fact that the Federal Power Act contains no provisions whatever prescribing any standards of propriety for such contracts, working
35 arrangements, and practices. The Commission is so proceeding despite the fact that there are no rules or regulations whatever issued by the Commission pursuant to the authority of the Federal Power Act, or otherwise, containing any provisions prescribing standards of propriety for such contracts, working arrangements, practices, and charges.

Twenty-third. The Commission now seeks to support its investigation, as appears by the Report, on the basis, fourthly, that it is an investigation to determine whether certain contracts and working arrangements between petitioners and other persons, and the charges made thereunder, warrant the adoption of rules or the issuance of orders by the Commission relating to such contracts, working arrangements, practices, and charges. The Commission is so proceeding, despite the fact that the Commission has no jurisdiction or power to adopt rules or to issue orders relating to such contracts, working arrangements, practices, or charges, in the absence of express statutory provision relating thereto in the Federal Power Act, or otherwise, and despite the fact that neither the Federal Power Act nor any other statute contains any such provisions.

Twenty-fourth. In fact, the bases now sought to be used to support such investigation are not only beyond the jurisdiction of the Commission, as aforesaid, but in reality the Commission has already proceeded with and is now prosecuting the same, for the sole purpose of obtaining information relating to the local and intrastate affairs of petitioners and other persons in order to obtain such information for the assistance of the Pennsylvania Commission in said proceedings for the imposition of penalties under the laws of the Commonwealth of Pennsylvania against petitioners, and
36 for the investigation of local and intrastate affairs of said petitioners. The Commission is so proceeding despite the fact that it has no jurisdiction or power under the Federal Power Act, or otherwise, to conduct such an investigation on any of the bases on which it now seeks to support the same; or for the actual purpose for which said investigation is being prosecuted.

Twenty-fifth. The Commission has not at any time or in anywise claimed or charged that petitioners are violating or are about to violate any law of the United States, the duty of the enforcement of which is imposed on the Commission, and, on information and belief, no complaint has ever been filed with the Commission charging any such violation. The Commission in this proceeding does not

purport to investigate facilities used in the transmission or sale of electric energy in interstate commerce. The Commission has no jurisdiction over the petitioners, in the premises, under the provisions of Parts II and III of the Federal Power Act, the only Act of Congress under which the Commission derives any power whatever. Nevertheless, the investigation now being carried on by the Commission and compliance by petitioners with the order, Exhibit D, require of petitioners the disclosure of matters, papers, and effects, the privacy of which is under the protection guaranteed to petitioners by Amendment IV to the Constitution of the United States.

Twenty-sixth. Compliance with the order, Exhibit D, will cause petitioners irreparable injury and damage, and will deprive them of their constitutional rights and will require them to render forced assistance to this Commission in carrying on a general inquisitorial investigation and fishing expedition into subject matters of which this Commission has no jurisdiction, where the only possible
37 purpose of such general inquisition and fishing expedition is the hope that matters might be produced which might be susceptible of use by the Pennsylvania Commission in such manner as to injure and discredit the petitioners.

Twenty-seventh. The enforcement of the order, Exhibit D, will require petitioners and their representatives to appear in Washington, D. C., on March 3, 1937, and then and there to produce the books, papers, and effects directed to be produced by the order, Exhibit D, and petitioners will thereby be deprived of their property and liberty without due process of law, in contravention of Amendment V to the Constitution of the United States.

Twenty-eighth. The Commission, in making and continuing its investigation pursuant to its order, Exhibit B, and in making its order, Exhibit D, is not only proceeding beyond the jurisdiction and powers conferred upon it by the Federal Power Act, but is proceeding with an investigation into affairs and matters of and between petitioners and others, which affairs are not subject to the control or jurisdiction of the Congress of the United States or of its subordinate agencies, as such control and jurisdiction are granted under Article I, Section 8, of, and limited by Amendment X to, the Constitution of the United States, in that said affairs do not affect commerce with foreign nations or among the several states of the United States, or with the Indian Tribes, but such affairs and matters of and between petitioners and others are expressly placed outside the control or jurisdiction of the Congress of the United States or of its subordinate agencies, by the terms of Amendment X to the Constitution of the United States. Said investigation and the orders of the Commission, Exhibits B and D, made in connection therewith are null and void, and said investigation and said orders are, and any attempted enforce-
38 ment of said orders would be, in violation of Article I, Section 8, of, and Amendment X to, the Constitution of the United States.

Twenty-ninth. The Commission in making and continuing to make its investigation pursuant to its order, Exhibit B, and in making its order, Exhibit D, and directing the same to petitioners, is assuming a jurisdiction over matters not embraced by the Federal Power Act, and its action in so doing is arbitrary, unreasonable, and capricious.

Thirtieth. If the Federal Power Act, directly or by construction, purports to give the jurisdiction now attempted to be exercised by the Commission, as herein described, then said Act is in violation of Amendment X to the Constitution of the United States. The attempted exercise of such powers is not only without authority of law but is further a violation of Amendment X to the Constitution of the United States.

Wherefore, for the reasons hereinabove set forth, your petitioners respectfully pray:

(a) that your Honorable Commission grant a rehearing in this proceeding;

(b) that upon such rehearing, your Honorable Commission enter an order vacating, setting aside, and annulling the order of the Commission dated January 26, 1937, Exhibit D, and terminating the proceeding purported to be instituted by the order of this Commission dated January 6, 1936, Exhibit B;

39 (c) that pending the disposition of this petition, all further proceedings herein be stayed and suspended.

METROPOLITAN EDISON COMPANY,
By RALPH D. JENNISON, *President.*
NORTHERN PENNSYLVANIA POWER COMPANY,
By RALPH D. JENNISON, *President.*
PENNSYLVANIA ELECTRIC COMPANY,
By RALPH D. JENNISON, *President.*
ERIE LIGHTING COMPANY,
By RALPH D. JENNISON, *President.*
THE CLARION RIVER POWER COMPANY,
By P. J. MORRISSEY, *Vice-President.*
SOLAR ELECTRIC COMPANY,
By C. W. WINEMAN, *Vice-President.*

40 [*Duly sworn to by Ralph D. Jennison et al.; jurats omitted in printing.*]

42 *Exhibit A to petition for rehearing*

Federal Power Commission, immediate release—Federal Power Act, release No. 20.

WASHINGTON, D. C., *November 26, 1935.*

Acting on the request of Governor George H. Earle and the Public Service Commission of Pennsylvania, the Federal Power Commission through Chairman Frank R. McNinch anounced today full cooperation under the Federal Power Act of 1935, in obtaining certain information sought by the Pennsylvania Commission from the Asso-

ciated Gas and Electric System in connection with an investigation of service and other charges by the Associated against its nine affiliated operating companies in that State.

The Federal Power Commission directed its General Counsel, Oswald Ryan, to go to Harrisburg for a conference with the Governor and the Pennsylvania Commission on procedure in the matter.

The Pennsylvania Commission last week opened its investigation of service and other charges by the Associated against the operating companies affiliated with it in that State. Governor Earle informed the Power Commission that counsel for the Associated said he could not give any assurance that an inspection of the Associated System's books outside of the State of Pennsylvania would be permitted.

43 *Exhibit B to petition for rehearing*

(Order of January 6, 1936)

Federal Power Commission—Frank R. McNinch (chairman), Basil Manly (vice chairman), Herbert J. Drane, Claude L. Draper, Clyde L. Seavey, Commissioners.

Order of inquiry and investigation of Metropolitan Edison Co. et al.

(IT 5015)

The following order was adopted:

It appearing to the Commission:

(1) That the Governor and the Public Service Commission of the Commonwealth of Pennsylvania have represented to the Federal Power Commission that in an inquiry now being prosecuted by said Public Service Commission, facts have been developed which show that Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, hereinafter called respondents, have certain contracts and working arrangements with persons who control, directly or indirectly, said respondents, or who are controlled by such persons; that said contracts and working arrangements are unjust and unreasonable and injuriously affect the rates and service of said respondents; that

44 certain of the books, accounts, records, and memoranda of such persons relating to said transactions are located outside the Commonwealth of Pennsylvania, some of said books, accounts, records, and memoranda having been removed from the Commonwealth of Pennsylvania during the course of said inquiry; and that full and complete inquiry into said transactions cannot be made without an examination of the books, accounts, records, and memoranda of such persons relating thereto;

(2) That full and complete information concerning said contracts and working arrangements and all expenditures and obligations incurred thereunder is necessary to enable the Federal Power Commis-

sion to determine whether, with respect to said matters, said respondents or any other persons are violating any provisions of the Federal Power Act or any rule, regulation, or order thereunder; to determine the effect of said contracts and working arrangements upon the cost of production and transmission of electric energy by means of facilities under the jurisdiction of the Commission; to aid said Commission in the enforcement of the regulatory and other provisions of the Federal Power Act in the performance of its duties and functions under said Act and in prescribing rules and regulations thereunder.

Now, therefore, it is ordered:

(a) That an investigation be and the same is hereby instituted to determine all facts, conditions, practices, and matters regarding the ownership, operation, management, and control of said respondents or either of them; all contracts and working arrangements between said respondents and any person who controls, directly or indirectly, said respondents or who is controlled by any such person and all expenditures and obligations incurred thereunder that in any way affect or relate to the business of said respondents or either of them;

45 (b) That said respondents file with the Federal Power Commission on or before February 1, 1936, (1) copies of all such contracts and full and complete statements of all such working arrangements with all such persons; (2) full and complete statements of all charges appearing on the books of said respondents for the years 1934 and 1935 representing payments made and obligations incurred by said respondents to any such persons together with the full name and address of the person with whom said charge first originated and the cost to such person of rendering the service for which said charge was made, and an explanation of the nature of the service performed and by whom performed;

(c) That all books, accounts, memoranda, records, and correspondence of the respondents and of any person who controls, directly or indirectly, said respondents and any other person controlled by such person, or any of them, in so far as they relate to said transactions with or the business of said respondents, upon demand, shall be made available for examination by this Commission's representatives;

(d) That a copy of this order be served by registered mail upon each of said respondents.

46 *Exhibit C to petition for rehearing*

For publication, immediate release—Federal Power Commission, release No. 30.

Federal Power Commission Orders an investigation of contracts, etc., of six Pennsylvania power companies

WASHINGTON, D. C., *January 6, 1936.*

The Federal Power Commission today entered an order of inquiry and investigation in connection with certain accounts and practices,

including charges assessed against them, of six public utility electric operating companies in Pennsylvania. The six companies, all of which are affiliates or subsidiaries of the Associated Gas and Electric System, are as follows: Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, Clarion River Power Company, Solar Electric Company.

The text of the order is attached.

The Federal Commission has advised the Pennsylvania authorities that at the appropriate time the joint hearing in connection with the investigation will be held with the Public Service Commission of Pennsylvania.

47 *Exhibit D to Petition for Rehearing*

(Order of January 26, 1937)

Federal Power Commission—Frank R. McNinch (chairman), Basil Manly (vice chairman), Herbert J. Drane, Claude L. Draper, Clyde L. Seavey, Commissioners.

Order and Notice of Hearing In Re Metropolitan Edison Co. et al.

(IT 5015)

The Commission adopted the following order and notice:

It appearing to the Commission:

(1) That in response to the Commission's Order of Inquiry and investigation entered in the above matter on January 6, 1936, Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, hereinafter referred to as respondents, reported charges appearing on the books of said companies for the years 1934 and 1935, representing payments made and obligations incurred to the following persons, viz, (a) "conceded affiliates." The Utility Management Corporation, E. M. Gilbert Engineering Corporation, Utilities Purchasing & Supply Corporation, Public Utilities Appliance Corporation, Employees Welfare Association, Inc., Utilities Employees Securities
48 Company, Utility Clearing Corporation, The Associated Corporation, Associated Gas & Electric Company, Associated Gas & Electric Securities Company, Inc. (Del.), Associated Real Properties, Inc., General Gas & Electric Corporation, and (b) "not conceded affiliates," Utility Accountants and Tax Consultants, Utility and Financial Accountants, Inc., Financial and Securities Assistants, Transfer and Coupon Paying Agency, H. C. Hopson & Company, Edward J. Cheney, Utility and Financial Advertising Agency, and C. M. M. Corporation.

(2) That examination of books and records of respondents and the following admitted affiliates of respondents, viz, Utility Clear-

ing Corporation, The Utility Management Corporation, E. M. Gilbert Engineering Corporation, Utilities Purchasing and Supply Corporation, Public Utilities Appliance Corporation and Utilities Employees Securities Company, as well as the examination of certain records of Employees Welfare Association, Inc., disclosed business transactions, during the years 1934 and 1935, between respondents and the following additional persons, viz, H. C. Hopson, Edmund B. Naylon, Corporate Records and Secretarial Assistants, Day & Co., Associated Gas & Electric Properties, Associated Securities Corporation, Associated Gas & Electric Corporation, NYPANJ Utililties Company, Metropolitan Edison Corporation, Associated Electric Company, Central U. S. Utilities Company, Pennsylvania Electric Corporation, and J. I. Mange.

(3) That accounting representatives of the Commission have prepared and submitted a report setting forth the results of its examination and investigation into certain charges reflected on the books of respondents which presents facts indicating that, Associated Gas & Electric Properties, Associated Securities Cor-
49 poration, Associated Gas & Electric Company, Associated Gas & Electric Corporation, Metropolitan Edison Corporation, NYPANJ Utilities Company, Associated Electric Company, Pennsylvania Electric Corporation, Central U. S. Utilities Company, J. I. Mange, Utility Accountants and Tax Consultants, Utility and Financial Accountants, Inc., Financial and Securities Assistants, Transfer and Coupon Paying Agency, Corporate Records and Secretarial Assistants, H. C. Hopson, H. C. Hopson & Company, Edward J. Cheney, Utility and Financial Advertising Agency, C. M. M. Corporation, Day & Company, Edmund B. Naylon, are persons which control respondents, or are controlled by the same persons which control respondents.

Now, therefore, it is ordered:

(a) That a hearing be held at 10:00 A. M., on March 3, 1937, in the Commission's hearing room in Washington, D. C., by the Federal Power Commission or such representative as the Commission may hereinafter designate for such purpose, to ascertain and determine all facts, conditions, practices, and matters regarding the ownership, operation, management, and control of said respondents or either of them; all contracts and working arrangements between said respondents and any person who controls, directly, or indirectly, said respondents or who is controlled by any such person, and all
50 expenditures and obligations incurred thereunder that in any way affect or relate to the business of said respondents or either of them;

(b) That the following persons (including respondents), viz: Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, Solar Electric Company, Associated Gas & Electric Properties, Associated Securities Corporation, Associated Gas & Electric Company, Associated Gas & Electric Cor-

poration, Metropolitan Edison Corporation, NYPANJ Utilities Company, Associated Electric Company, Pennsylvania Electric Corporation, Central U. S. Utilities Company, The Associated Corporation, Associated Gas & Electric Securities Co. Inc. (Del.), Associated Real Properties, Inc., General Gas & Electric Corporation, Utility Clearing Corporation, The Utility Management Corporation, E. M. Gilbert Engineering Corporation, Utilities Purchasing & Supply Corporation, Utilities Employees Securities Company, Public Utilities Appliance Corporation, Employees Welfare Association, Inc., Utility Accountants and Tax Consultants, Utility and Financial Accountants, Inc., Financial and Securities Assistants, Transfer and Coupon Paying Agency, Corporate Records and Secretarial Assistants, J. I. Mange, H. C. Hopson, H. C. Hopson & Company,
51 Edward J. Cheney, Utility and Financial Advertising Agency, C. M. M. Corporation, Day & Company, Edmund B. Naylon, be and they are hereby directed to appear on March 3, 1937, and present for the record at such hearing, for the years 1934, 1935, and to date, full and complete information as to the person or persons which controlled, directly or indirectly, the respondents or either of them and any of the persons named above controlled, directly or indirectly, by such person or persons; and, to assist the Commission in determining the facts as to the control of each person named above, each such person is directed to present specific information and data at said hearing showing: (1) the form of its organization, i. e., whether individual, partnership, corporation, trust, or otherwise, under which such person exists; (2) the articles of incorporation, partnership agreement, trust agreement, and/or any other document or documents by which such person was created, formed, exists, or operates, as originally created and as subsequently changed, modified, amended, or otherwise altered; (3) the full name and address of each partner, director, officer, trustee, agent, or other individual elected, appointed, or authorized to act for such person under any circumstance whatsoever; (4) the ownership or interest, legal or beneficial, held by such persons, or any of them, in or over any other person named above, as well as the manner or means by which such ownership or interest is accomplished and/or maintained; and (5) such other and further pertinent data or information relating to the matters under investigation, as may from time to time during the course of said hearing, be required by the Commission.

52 (c) That a copy of the report, as prepared by the accounting representatives of the Commission and setting forth the results of their investigation and examination into certain charges reflected on the books of respondents, be served on each person named in paragraph (b) of this order.

Notice.—The matters assigned for hearing under the foregoing order will be heard by the Federal Power Commission sitting jointly with The Public Service Commission of the Commonwealth of Pennsylvania.

53 *Exhibit E to petition for rehearing*

For publication, immediate release.—Federal Power Commission, release No. 163.

Federal Power Commission sets March 3 for joint hearing with Pennsylvania Commission to investigate control of numerous servicing companies of Associated Gas & Electric System

WASHINGTON, D. C., *January 27, 1937.*

The Federal Power Commission, sitting jointly with the Pennsylvania Public Service Commission, will hold a hearing on March 3, 1937, at its hearing room in Washington, D. C., "to ascertain and determine all facts, conditions, practices, and matters regarding the ownership, operation, management, and control" of the numerous servicing companies in the Associated Gas and Electric System.

This hearing, the first in which the Federal Power Commission has exercised the authority given it by the Federal Power Act of 1935, to hold joint hearings with State commissions on matters of mutual interest, is the result, Chairman Frank R. McNinch stated, of requests by the Governor of Pennsylvania and the Pennsylvania Public Service Commission for assistance in procuring records of Associated Gas & Electric Companies which the Pennsylvania Commission lacked authority to obtain except through exercise of the Federal jurisdiction.

Investigation will also be made of all contracts and working arrangements with such companies and all expenditures and obligations made or incurred by the several operating companies of the Associated System in the Commonwealth of Pennsylvania, to these servicing companies.

Investigation was begun in January 1936, and related to
54 charges reflected on the books of six operating companies of the Associated Gas & Electric System, situated in the State of Pennsylvania, namely: Metropolitan Edison Co., Northern Pennsylvania Power Co., Pennsylvania Electric Co., Erie Lighting Co., The Clarion River Power Co., and Solar Electric Co. They were directed to furnish copies of all contracts and working agreements between these companies and any person who controlled them directly or indirectly, or was controlled by such person; to furnish full and complete statements of all charges on the books of the companies for 1934 and 1935 representing payments made or obligations incurred by the companies to any persons who controlled the companies "or were controlled by the same persons who controlled respondents."

In making returns under the Commission's order, the companies separated charges appearing on their books into two classes: (1) charges made by companies conceded to be affiliates of respondents, and (2) companies not conceded to be affiliates.

Companies not conceded to be affiliates were: Utility Accountants and Tax Consultants, Utility and Financial Accountants, Inc., Financial and Securities Assistants, Transfer and Coupon Paying Agency, H. C. Hopson & Company, Edward J. Cheney, Utility and

Financial Advertising Agency, C. M. M. Corporation, Day & Company.

Accounting representatives of the Commission assigned to the field investigation have reported that they were denied access to the books of the companies not conceded to be affiliates, as well as the books and records of Employees' Welfare Association, Inc., a conceded affiliate. This action on the part of the so-called nonaffiliated servicing companies of the Associated System has necessitated the hearing called for March 3, 1937, to determine whether these companies are in fact "controlled by the same persons who control respondents."

55 *Exhibit B to petition*

Before the Federal Power Commission

IN RE: METROPOLITAN EDISON COMPANY, NORTHERN PENNSYLVANIA POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, THE CLARION RIVER POWER COMPANY, SOLAR ELECTRIC COMPANY

(No. IT–5015)

Petition of respondents for an adjudication in respect to the petition for a rehearing

Filed February 23, 1937

To the Federal Power Commission:

The petition of Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and the Solar Electric Company respectfully represents:

1. That on the 23rd day of February 1937, your respondents filed with the Federal Power Commission a petition for a rehearing on an order of your Honorable Commission made and entered on January 26, 1937 (which ordered an inquiry and investigation into certain specified matters covered by said order of January 26, 1937, for March 3, 1937), praying (a) that your Honorable Com-
56 mission on such rehearing enter an order vacating the said order dated January 26, 1937, and terminating the proceeding purported to be instituted by the order of your Honorable Commission dated January 6, 1936; and (b) that all further proceedings be stayed pending the disposition of the petition.

2. That on the 24th day of February 1937, your Honorable Commission continued without day the hearing set for March 3, 1937 on said order of inquiry and investigation.

3. That on the 23rd day of March 1937, your Honorable Commission granted the petition of your respondents for a rehearing and fixed Wednesday, April 14, 1937, for a hearing on the said petition for a rehearing before the Honorable Frank A. Hampton, Esq., Examiner.

4. After your respondents had set forth the evidence which your respondents desired to submit in support of the petition for a rehearing, it became evident that the attorneys for your Honorable Commission intended to proceed with what the said attorneys conceive to be the investigation instituted by the order of January 6, 1936, in aid of which the order of January 26, 1937, was made, which said order of January 26, 1937, your respondents, by their petition for rehearing, had asked to be annulled and vacated, hearing on said order of investigation having, on February 24, 1937, been continued without day.

5. Your respondents, as soon as it had become evident to them that it was the intention of the attorneys for the Commission to proceed under the very orders the validity of which the respondents were questioning, made an application to your Honorable Examiner, as will appear from the notes of testimony, to certify to your Honorable Body the following request: "The respondents hereby
57 request the Federal Power Commission (1) to define the issues to be determined by the examiner on the respondents' petition for a rehearing; (2) to instruct its own attorneys that no evidence pursuant to the orders of January 6, 1936, and January 26, 1937, be introduced on the petition for a rehearing, and that no proceedings be taken pursuant to said orders until the question of the right of the Commission to make the orders be determined; (3) that the proceedings before the examiner be stayed pending this reference to the Commission and that counsel for the respondents be permitted to be heard by the Commission on this reference."

6. The examiner, as will appear by the notes of testimony, denied the respondents' motion to submit the request to your Honorable Commission.

7. The examiner, following the denial of the motion to submit respondents' requests to your Honorable Commission, rule (Rec. 120, et seq.):

"Examiner HAMPTON. First, as to the matter of the requested certification of the question to the Commission: The Examiner certified a question on the day before yesterday, because that was a question that was presented at the very threshold of the inquiry. Our rules of procedure do not provide for the certification of questions to the Commission for its immediate decision during a hearing before an examiner. There is no definite rule against it, however, and in as much as it was a question that was presented, as I have said, at the very threshold of the inquiry and before the beginning of the taking of testimony and because, further, it went to the very fundamental right of permitting respondents to see the formal record—to see the papers contained in the formal record of the case that was to be tried, I deemed it proper to grant the request and I did present the question to the Commission, recessing the hearing in the meantime; and then brought back the Commissioner's answer.

58 "But now, inasmuch as this inquiry is in the course of hearing and testimony has been taken and evidence adduced, the

Examiner conceives that from now following he will have to rule upon the questions that arise; and if counsel on either side are not content with his ruling they must take their exceptions which will hereafter be presented to the Commission and opportunity be allowed thereafter to those taking the exceptions to argue them before the Commission. That is the only method by which the rulings of the Examiner during the course of a trial may be appealed for review by the Commission under the rules and regulations that are in force here.

"I must, therefore, under the rules and regulations of the Commission deny the request of the motion—if it was a motion—to recess the hearing at this point in order to present this question to the Commission for immediate answer.

"That decision makes it necessary for the Examiner himself to rule upon the point that has been raised today by respondents' counsel.

"In considering this point the Examiner thinks we should bear in mind, first, that this is an investigational proceeding; it is a proceeding for the discovery of certain facts for the purposes as set out in the recital preliminary to the order and published and served with the order of January 6, 1936.

"What the Commission will do with facts ascertained and disclosed by an investigational proceeding such as this is for the Commission to determine after the facts and the results of the investigation are in hand.

"Now, following the order of January 6, 1936, respondents, with certain reservations made returns in response to that order, and those returns the Commission deemed not sufficiently full and complete to furnish the Commission with the information which it had issued the order of January 6, 1936, to procure.

"Therefore, on January 26, 1937, the Commission issued a
59 further order, and that order set a hearing to complete the procurement of the information which it was the purpose of the first order to obtain.

"Following the issuance of that order and the service upon the respondents, the respondents filed their petition for rehearing.

"Now, the Examiner considers that full faith and credit must be given to the basis of the order of January 6, 1936, as stated in the recital therein preliminary to the order proper.

"The petition for rehearing which has been filed, as has been stated by the solicitor for the Commission raises jurisdictional question of two characters: *It* (It) raises the question of the jurisdiction of the parties; and then it raises the question of jurisdiction of the subject matter of the investigation. It makes numerous allegations of facts in support of its contentions with respect to lack of jurisdiction of parties and subject matter.

"It raises the question, for instance, whether this proceeding was instituted touching the respondents for the purpose of supplying

information to the Pennsylvania Commission and alleges that the subject matter relates solely to local and intrastate affairs of the petitioners.

"It raises a question as to whether certain respondents are engaged in business wholly within the Commonwealth of Pennsylvania and alleges that they neither own nor operate facilities for the interstate transmission of electric energy. It alleges one of the purposes of the investigation is that this Commission desires to furnish facts to the Pennsylvania Commission so that that Commission may impose certain penalties upon certain of the parties. It raises certain factual questions with reference to the employment and report of the Commission's field accountants who made an accounting report to the Commission following the response of the petitioners to the first order.

"It raises the question and alleges that compliance with the
60 order of the Commission would cause the petitioners irreparable injury and damage in addition to depriving them of their constitutional rights.

"It charges this Commission with engaging in a 'fishing expedition' and to that extent questions the integrity of the purposes of this Commission in instituting this proceeding.

"It alleges that none of the affairs of the respondents affect commerce with foreign nations or among the several States of the United States or with the Indian tribes.

"It alleges that the Commission has no jurisdictional power to adopt rules or orders relating to contracts and working arrangements between petitioners, one of whom is the Commission's licensee and some of whom are admittedly public utilities under the Federal Power Act, and other persons.

"Now, as to the questions of fact, most of which relate to the jurisdictional questions, the Examiner does not forget that this investigation was instituted not by the order of January 26, 1937, but by the order of January 6, 1936. Therein the purpose of the investigation is stated. The order of January 26, 1937, was in aid of the order of January 6, 1936; and the petition filed by the petitioners—the respondents in the inquiry first instituted—asks that both orders and the proceedings under them be vacated. It brings into this hearing, it seems to the Examiner, in order to determine the jurisdiction of the Commission, practically the full scope of the facts called for in the first order.

"In other words, this petition, it seems to the Examiner, searches the whole record. Certainly it is necessary that the affairs of the respondents be gone into in this investigation, in order to enable the Examiner, first, and the Commission on review of the Examiner's report, the record and the exceptions and arguments, to determine the question of jurisdiction as to the parties.

"The Examiner recognizes also this fact: That this is not the
61 trial of a case in a United States District Court or other court. This is an administrative hearing.

"The fundamental question here, as the Examiner sees it, is whether or not this Commission has the power to make the investigation. That is the question raised by the petition for rehearing; and in order to determine that question, the Commission must use the power given it by the statute, and respecting its possession of this power the Examiner has no doubt, to determine which of these respondents are public utilities; to determine the state of facts as to the charges they pay and enter on their books for services rendered by affiliates, to determine their affiliation with each other and the companies charging them for services, and to investigate the facts touching the allegations of fact contained in the petition for rehearing which is now before us.

"It seems impossible to separate the questions raised by the petition from the questions involved in the Commission's orders of January 6, 1936, and January 26, 1937.

"We are not required in this administrative proceeding, as the Examiner stated two days ago in ruling in favor of the respondents on another matter relating to the admissibility of certain evidence we are not required to adhere strictly to the common law rules of evidence, or even to the more relaxed statutory rules of evidence that obtain in some of the courts of the land. The power of investigation necessarily must be exercised in a way involving broad discretion and latitude in order to effect its purpose. The purpose of an investigation is to discover, and it is sometimes necessary to discover hidden things. It is not the trial of one definite issue standing alone that is involved here; it is the discovery of all the facts necessary to be passed upon in order to determine the question of jurisdiction.

"The Examiner has no idea of confirming the introduction of
62 testimony in this case to that which would be admitted in a court of common law.

"The facts necessary to discover and which the Commission wishes to discover can hurt no honest person or purpose and they are facts peculiarly within the knowledge of the respondents. The testimony that has been proffered here and introduced here by the Commission's counsel is testimony relating to affairs and matters much of which is reflected on the books of the respondents themselves, which books are of course in the possession of the respondents.

"Three of the respondents are admittedly public utilities and one is a licensee of the Commission. Their business is a business affected with a public use, in which the public interest is important, which public interest this Commission is charged with the duty of protecting.

"The Examiner will state now that, considering the searching nature of the petition that has been filed here, its factual allegations, and the other facts that he has recited, he expects to rule and does rule that Commission's counsel here may introduce evidence touching matters appearing on the books of the respondent corporations, evidence relating to the affiliation of the respondent public utilities with other electric utilities and with companies whose

charges appear on the books of the public utility respondents in this proceeding, and with relation to such charges; as well as to the business operation, contracts and records of respondents is (if) that will aid in determining the jurisdictional questions here raised. That is the ruling of the Examiner." [Parenthetical insertion ours.]

8. On the request of the petitioners an exception to the Examiner's ruling was allowed and the respondents requested that the said ruling be certified to your Honorable Commission for review.

63 9. Your Honorable Examiner refused to certify his ruling to your Honorable body but granted to your respondents an exception to his ruling.

10. Your respondents aver that under the Act of Congress creating the Federal Power Commission, any order made by your Honorable Commission in any proceeding under the Act is subject to judicial review in accordance with the terms of the said Act, but that before an appeal can be taken in accordance with the terms of the said Act, from any order made in any such proceeding, a petition for a rehearing must be filed setting forth the objections to the said order.

11. Your respondents aver that for the purpose of perfecting their right to an appeal from the order of your Honorable Commission dated January 26, 1937, which respondents believe was beyond the jurisdiction of the Commission, your respondents filed a petition for a rehearing, which petition for a rehearing your Honorable Commission set forth a hearing before the Honorable Frank A. Hampton, as hereinbefore set forth.

12. Your respondents aver, that if the attorneys for your Honorable Commission and the Examiner are permitted to proceed as they have indicated they intend to proceed, your respondents are being denied their right of appeal and their right to have the said order dated January 26, 1937, judicially reviewed as provided for in the Federal Power Act and your respondents are being put to great expense and inconveience in the conduct of a long investigation, which said investigation would be useless, if the respondents' contentions as to the power of your Honorable Commission to make the order complained of are sustained.

Your respondents therefore pray your Honorable Commission, in the alternative:

64 1. If your Honorable Commission has determined to affirm its right to make the order of January 26, 1937, that your Honorable Commission enter an order to that effect so that your respondents may proceed to a judicial review of the right of your Honorable Commission to make the said order.

2. If, however, your Honorable Commission has not so determined to sustain the said order of January 26, 1937, that you instruct your Honorable Examiner to confine the testimony in the rehearing now pending to matters raised by the petition for rehearing, to wit: the jurisdiction of the Commission over the respondents and the power and authority of the Commission to make the said order of January

26, 1937, and that, pending action on the prayer of your petitioners for a vacation of the order of the Commission, dated January 26, 1937, any proceedings directed towards an investigation or discovery with respect to the matters set forth in said order (hearing on which investigation was postponed by this Commission without day) be stayed.

Respondents respectfully suggest to your Honorable Commission that it is inconceivable to respondents that your Honorable Commission could have intended to enter into the very investigation, the right to make which was questioned, under the guise of granting a petition for rehearing, the sole purpose of which was clearly to raise the question of the legality of the order of January 26, 1937, the right of the Commission to make the investigation proposed thereby, and the jurisdiction of your Commission over the persons of some of your respondents, after continuing without day the hearing set for making such investigation, which continuance, it is submitted, respondents had a right to assume was granted in compliance
65 with its request for a suspension of all further proceedings in pursuance of said order, pending the disposition of the petition for rehearing.

And your petitioners will ever pray.

WALTER BIDDLE SAUL,
Attorney for Respondents.

[*Duly sworn to by Walter Biddle Saul; jurat omitted in printing.*]

66 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Stipulation re paragraph (b) of order of Commission

Filed April 27, 1937

To avoid the chance of misunderstanding and to give adequate assurance to this court that none of the persons named in paragraph (b) of the order of the Federal Power Commission dated January 26, 1937 (petition, pp. 50–51) are now under compulsion to respond thereto, the Solicitor for the Federal Power Commission hereby stipulates that the Federal Power Commission construes the granting of the petition for rehearing as relieving all persons named in said paragraph (b) of said order from responding thereto and that no effort has been made or will be made to enforce paragraph (b) of said order.

DOZIER A. DEVANE,
Solicitor for Federal Power Commission.

[File endorsement omitted.]

67 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Motion to dismiss petition for rule to show cause and for stay of proceedings

Filed May 10, 1937

Comes now the Federal Power Commission by its duly authorized attorneys and moves this Court to dismiss the petition filed in this cause for the reasons that said petition does not state grounds upon which the writ prayed for may lawfully issue; that the relief prayed is not within the jurisdiction of this Court; and that petitioners have a full, adequate, and complete remedy at law.

OSWALD RYAN, *General Counsel*,
DOZIER A. DEVANE, *Solicitor*,
LAMBERT MCALLISTER, *Attorney*,
Attorneys for Federal Power Commission.

[File endorsement omitted.]

68 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order granting rule to show cause

Filed July 6, 1937

Upon consideration of the pleadings, briefs, and arguments of counsel in the above-entitled matter,

It is ordered that a rule is hereby granted upon the Federal Power Commission to show cause why an order should not be made as prayed for by petitioners, returnable Monday, October 4, 1937, at 10 a. m.

Philadelphia, July 6, 1937.

BUFFINGTON, *Circuit Judge.*

[File endorsement omitted.]

69 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Notice

Filed Sept. 2, 1937

FEDERAL POWER COMMISSION,
Hurley-Wright Building, 1800 Pennsylvania Avenue NW.,
Washington, D. C.

Notice is hereby given that an application for a stay in the above entitled case restraining the Federal Power Commission from pro-

ceeding against petitioners with its hearing on September 14, 1937, will be made to the United States Circuit Court of Appeals for the Third Circuit, at Philadelphia, Pa., on the 7th day of September 1937, at 2 o'clock, P. M., Daylight Saving Time.

A copy of the application for said stay is herewith enclosed.

WALTER BIDDLE SAUL

70 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Petition for stay of proceedings

Filed Sept. 2, 1937

To the Honorable the Judges of the Circuit Court of Appeals for the Third Circuit:

Your petitioners, Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company and Solar Electric Company, respectfully aver:

1. On the 27th day of April 1937, your petitioners applied to your Honorable Court for a Rule upon the Federal Power Commission to show cause, inter alia, why the Federal Power Commission should not be enjoined and restrained from continuing with an inquiry and investigation against your petitioners until such time as your petitioners' petition to said Commission for a rehearing, questioning the jurisdiction and power of said Commission to conduct such inquiry and investigation, and to make its order dated January 27, 1937, under which said Commission purported to proceed, had been disposed of by the Commission and an opportunity afforded to your petitioners for a review of the action of the Federal Power Commission by your Honorable Court.

2. The petition was presented to your Honorable Court and orally argued on the 27th day of April 1937, and written briefs filed subsequent to said oral argument.

71 3. At the said oral argument, counsel for the Federal Power Commission stipulated that the Commission would suspend its proceedings if a Rule were issued, pending a hearing and determination on the return of the Rule. For this reason, in petitioners' reply brief dated April 30, 1937, petitioners did not press their application for a stay of proceedings.

4. In the second reply brief filed on behalf of the Commission on May 8, 1937, counsel for the Commission attempted to limit the stipulation which had been made at the hearing by inserting the following statement in the said supplemental reply brief:

"In accordance with this Stipulation the Federal Power Commission has recessed the hearings in the proceeding before it. However the Commission is unwilling to voluntarily suspend the hear-

ings beyond the time necessary to afford this court an opportunity to determine whether a Rule should issue."

The stipulation to which this above paragraph referred was according to the Commission's Supplemental Reply Brief of May 8, 1937, made in the following language:

"The Stipulation which counsel for the Commission made with the court is as follows:

"Pending consideration by this court whether a Rule should issue in this court the Federal Power Commission will suspend the hearings in the proceedings before it."

5. Your Honorable Court on July 6, 1937, entered the following order:

"Upon consideration of the pleadings, briefs and arguments of counsel in the above-entitled matter,

"It is ordered that a rule is hereby granted upon the Federal Power Commission to show cause why an order should not be made as prayed for by petitioners, returnable Monday, October 4, 1937, at 10 A. M.

"Philadelphia, July 6, 1937.

"BUFFINGTON, *Circuit Judge.*"

72 6. On or about August 25, 1937, the Federal Power Commission gave notice that it would resume public hearings notwithstanding the granting of the said Rule on September 14, 1937, the said notice being in the following form:

"Notice is hereby given that public hearing will be resumed in the above matter on September 14, 1937, at 10 A. M. in the hearing room of the Commission, Hurley-Wright Building, 1800 Pennsylvania Avenue NW., Washington, D. C.

"LEON M. FUQUAY, *Secretary.*"

7. The said notice was mailed not only to the petitioners but to the thirty-three persons, firms, and corporations whose names appear in the questioned Order of the Commission dated January 26, 1937.

8. Your petitioners aver that the right to proceed with the hearing which the Federal Power Commission has set for September 14, 1937, is the issue raised by the petition therein, and is the very matter which your Honorable Court has set for the hearing on Monday, October 4, 1937; and that if the Federal Power Commission is permitted to continue to proceed with the hearing on September 14, 1937, the Rule which your Honorable Court has heretofore granted after full argument will become moot and your petitioners will be deprived of their rights without recourse and the Appellate Jurisdiction of your Honorable Court provided for in the Act of Congress creating the Federal Power Commission will be destroyed and rendered of no avail by the precipitate action of the Federal Power Commission.

9. Your petitioners point out that the date of the last hearing before the Federal Power Commission was April 22, 1937; that since the issue of the rule to show cause herein on July 6, 1937,

73 no action was taken by the Federal Power Commission in furtherance of hearings on the petitioners' petition to said Commission for Rehearing until August 25, 1937, the date on which notice was given of the hearing to be held on September 14, 1937; that the date for such proposed hearing is only slightly more than two weeks prior to the return date of the rule to show cause issued by your Honorable Court, at which time the propriety of any further hearings on petitioners' petition for rehearing will be argued before your Honorable Court and presented to it for its determination; that manifestiy no urgency exists for the conduct of questioned hearings two weeks prior to the consideration by the Court of the propriety thereof; that while on the one hand, the petitioners will be irreparably deprived of their rights if the proposed hearing before the Commission is permitted to be held, on the other hand, the Federal Power Commission can in no wise be damaged or prejudiced in the proper conduct of its investigation by the stay or postponement of the proposed hearing until the decision of your Honorable Court upon the return of the rule to show cause herein.

10. Your petitioners therefore pray that your Honorable Court temporarily enjoin and stay all proceedings, including the proposed hearing on September 14, 1937, on the part of the Federal Power Commission in connection with its purported inquiry and investigation and upon the Petition for Rehearing filed with the said Commission, pending the hearing had upon the rule to show cause heretofore issued on July 6, 1937, and the determination by this Court of the prayers of the petition heretofore filed herein.

74 And your petitioners will ever pray, etc.

METROPOLITAN EDISON COMPANY,
NORTHERN PENNSYLVANIA POWER COMPANY,
PENNSYLVANIA ELECTRIC COMPANY,
ERIE LIGHTING COMPANY,
THE CLARION RIVER POWER COMPANY,
SOLAR ELECTRIC COMPANY,
Petitioners,

By WALTER BIDDLE SAUL,
Counsel for Petitioners.

SAUL, EWING, REMICK & SAUL.
2301 Packard Building, Philadelphia, Pa.
TRAVIS, BROWNBACK & PAXSON.
61 Broadway, New York, N. Y.,
Attorneys for Petitioners.

75 [*Duly sworn to by Walter Biddle Saul; jurat omitted in printing.*]

[File endorsement omitted.]

76 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Minute entry of hearing

And afterwards, to wit, the 7th day of September 1937, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on petition for stay of proceedings, before the Honorable J. Warren Davis and Honorable John Biggs, Jr., Circuit Judges.

Whereupon the Court made the following order:

77 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Return on behalf of the Federal Power Commission to rule to show cause

Filed Sept. 21, 1937

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Comes now the Federal Power Commission and for return to the order to show cause, issued out of this Honorable Court on July 6, 1937 in the above-entitled matter, respectfully shows that:

1. The Federal Power Commission is a federal administrative agency created by Act of Congress and is charged with the duty of enforcing and administering the Federal Power Act. (41 Stat., 1063; 41 Stat., 1353; 46 Stat., 797; 49 Stat., 847; 16 U. S. C., 791a–825r.)

2. Title II of the Public Utility Act of 1935 (approved August 26, 1935, 49 Stat. 847–863) amended the Federal Water Power Act as amended (41 Stat. 1063–1077, 41 Stat. 1353, 46 Stat. 797), and conferred upon the Federal Power Commission new and extensive regulatory powers over public utilities as therein defined and over licensees subject to the jurisdiction of the Commission. Title II of the Public Utility Act of 1935 was by Section 320 thereof
78 given a short title "Federal Power Act," sometimes hereinafter referred to as the "Act." Part I of the Act relates to the jurisdiction and authority of the Federal Power Commission over the construction, operation, and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States or, upon any part of the public lands and reservations

of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, and over persons receiving licenses from the Commission thereunder for the construction of licensed projects. Part II relates to the jurisdiction of the Commission over public utilities engaged in the transmission of electric energy in interstate commerce and in the sale at wholesale of electric energy in interstate commerce. Part III prescribes the administrative and procedural jurisdiction of the Commission, and the jurisdiction of the Courts relating to both licensees and public utilities.

3. The Act (Sections 206, 209, and 302) provides for the fullest cooperation between the Federal Power Commission and State regulatory commissions to the end that there may be full and complete regulation of public utilities in the public interest.

4. On August 31, 1935, the Federal Power Commission transmitted to members of all State regulatory commissions a copy of the
79 Public Utility Act of 1935, called attention to the cooperative provisions of Title II of the Act, and tendered to the State commissions fullest cooperation in the administration of Title II of said Act. Directly thereafter, the Public Service Commission of the Commonwealth of Pennsylvania and the Governor of said State informed the Federal Power Commission that, in an inquiry being prosecuted before said Public Service Commission of Pennsylvania, facts had been developed which showed that Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company had entered into certain contracts and working arrangements with persons who controlled them, directly or indirectly, or who were controlled by the same persons that controlled them, and that said contracts and working arrangements were unjust and unreasonable, and injuriously affected the rates and services of said companies, that certain of the books, accounts, records, and memoranda of such persons relating to said transactions were located outside the Commonwealth of Pennsylvania and beyond the jurisdiction of the Public Service Commission of Pennsylvania, and that full and complete inquiry into said transactions could not be made without an examination of these books, accounts, records, and memoranda, and the Federal Power Commission was requested to exercise its authority under the Federal Power Act to secure full and complete information concerning said contracts and working arrangements and all expenditures and obligations incurred thereunder, and to make available to the Public Service Commission of Pennsylvania, as authorized by the Act, such information secured as the result of said investigation as would be of assistance to said State commission in the regulation of said companies.

80 5. Acting pursuant to said request, the Federal Power Commission on January 6, 1936, upon its own motion, adopted an

order of inquiry and investigation against Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, who were therein named respondents. Said order required said respondents:

(a) To furnish to the Commission copies of all contracts, and full and complete statements of all working arrangements between said respondents and any person who controlled, directly or indirectly, said respondents or who was controlled by any such person;

(b) Full and complete statements of all charges appearing on the books of said respondents for the years 1934 and 1935 representing payments made and obligations incurred by respondents to any person who controlled respondents, directly or indirectly, or who were controlled by the same persons who controlled respondents;

(c) The full name and address of the person with whom the charge first originated and the cost to such person of rendering the services for which the charge was made as well as an explanation of the nature of the service performed and by whom performed.

81 A full and complete copy of the order of the Federal Power Commission under date of January 6, 1936 is attached hereto as Exhibit A and by reference made a part hereof.

6. In response to said order of inquiry and investigation, each of said respondents, saving and reserving unto themselves all rights of every kind to raise the question of legality and authority of the Federal Power Commission to make said order, and to raise the question of the constitutionality of the Act under which the Federal Power Commission purported to act, filed returns with the Commission showing contracts between each of them, and The Utility Management Corporation, E. M. Gilbert Engineering Corporation, and Utilities Purchasing & Supply Corporation, and each of said respondents except Solar Electric Company and The Clarion River Power Company reported contracts with Utility Accountants and Tax Consultants. Copies of all such contracts were filed with respondents' returns. Respondents also reported working arrangements between them and Employees' Welfare Association, Inc., Utility Clearing Corporation, Utilities Employees Securities Company, Transfer and Coupon Paying Agency, Financial and Securities Assistants, E. J. Cheney, and Utility and Financial Advertising Agency. A brief description of each of the above-named organizations and a statement of the services furnished was shown. Said respondents also made returns of the charges appearing on their books for the years 1934 and 1935 representing payments made or obligations incurred as called for by the Commission's order. Affiliation was denied, however, as to some of the companies to whom said payments were made. The following statements compiled from the returns of all respondents show the charges reported by the respondents in response to the Commission's order classified as they were in the returns between "companies conceded affiliates" and "companies not conceded affiliates."

	Metropolitan Edison Co.	Northern Penna. Power Co.	Penna. Electric Co.	Erie Lighting Co.	The Clarion River Power Co.	Solar Electric Co.	Total
Companies' conceded affiliates:							
The Utility Management Corporation	$264,326.95	$36,763.00	$198,631.69	$37,106.41	$553.03	$2,539.99	$539,921.07
E. M. Gilbert Engineering Corporation	54,876.69	22,127.89	18,221.88	4,560.45	665.90	335.22	100,788.03
Utilities Purchasing & Supply Corporation	17,212.42	1,306.74	7,869.10	2,634.17	68.67	12.84	29,103.94
Public Utilities Appliance Corporation	10,768.18		279.25				11,047.43
Employees Welfare Association, Inc.	119,229.60	9,984.70	74,038.20	17,402.61	1,058.56	431.04	222,144.71
Utilities Employees Securities Company	62,758.33	6,030.06	35,296.46	10,134.57	535.99	285.20	115,040.61
Utility Clearing Corporation	182,140.58	26,100.76	111,123.68	31,532.69	2,251.11	908.64	354,057.46
The Associated Corporation	255.23	14,000.00	150.00				14,405.23
Associated Gas & Electric Company			20.53				20.53
Associated Gas & Electric Securities Co., Inc. (Del.)			624.95				624.95
Associated Public Utilities Corporation							
Associated Real Properties, Inc.	165.00						165.00
General Gas & Electric Corporation	5,220.80	3,947.64					9,168.44
Metropolitan Edison Corporation							
Pennsylvania Electric Corporation							
Associated Gas & Electric System [1]							
Associated Gas & Electric Companies							
Associated Gas & Electric Securities [1]							
Companies' stock investing committee							
	716,953.78	120,260.79	446,255.74	103,370.90	5,133.26	4,512.93	1,396,487.40
Companies' not conceded affiliates:							
Utility Accountants and Tax Consultants	25,673.48	6,750.61	37,652.50	4,902.60	4,634.22	598.35	80,301.76
Transfer and Coupon Paying Agency	5,196.79	267.78	4,824.78		389.62		10,678.97
Financial & Securities Assistants	2,518.94	82.70	779.12		327.66		3,708.42
Daniel Starch & Staff							
E. J. Cheney	8,844.92	70,457.07	2,149.20	640.97	385.00	115.00	82,592.16
Utility and Financial Accountants, Inc.	500.00						500.00
Utility and Financial Advertising Agency	2,574.59	5,964.33	2,570.38	265.06			11,374.36
H. C. Hopson & Company	131.00	6.00					137.00
G. M. M. Corporation	4,631.36	2,211.00	1,998.11				8,840.47
Day & Company [2]							
	50,071.08	85,739.49	49,974.09	5,898.63	5,736.50	713.35	198,133.14
	767,024.86	206,000.28	496,229.83	109,269.53	10,869.76	5,226.28	1,594,620.54

[1] Not corporations.
[2] Nominee partnership for registration of securities.

	Metropolitan Edison Co.	Northern Penna. Power Co.	Penna. Electric Co.	Erie Lighting Co.	The Clarion River Power Co.	Solar Electric Co.	Total
Companies' conceded affiliates:							
The Utility Management Corporation	$279,286.98	$36,311.65	$207,785.63	$37,548.05	$270.78	$2,240.54	$563,443.63
E. M. Gilbert Engineering Corporation	100,529.38	26,916.80	30,276.97	3,446.67	1,386.42	325.55	162,881.79
Utilities Purchasing & Supply Corporation	26,407.99	2,313.42	9,439.42	3,151.44	90.33	6.14	41,408.74
Public Utilities Appliance Corporation	2,489.63						2,489.63
Employees Welfare Association, Inc.	122,673.60	10,955.11	74,758.81	17,547.08	1,120.19	431.04	227,485.83
Utilities Employees Securities Company	74,178.95	7,018.97	39,329.01	11,336.40	599.55	319.02	132,781.90
Utility Clearing Corporation	326,356.07	44,450.52	234,409.80	33,711.54	1,609.01	888.37	641,425.31
The Associated Corporation	346.52		213.56				560.08
Associated Gas & Electric Company							
Associated Gas & Electric Securities Co., Inc. (Del.)							
Associated Public Utilities Corporation							
Associated Real Properties, Inc.	180.00						180.00
General Gas & Electric Corporation	1,647.16	14,098.44					15,745.60
Metropolitan Edison Corporation							
Pennsylvania Electric Corporation							
Associated Gas & Electric System [1]							
Associated Gas & Electric Companies [1]							
Associated Gas & Electric Securities [1]							
Companies' stock investing committee							
	934,096.28	142,064.91	596,213.20	106,741.18	5,076.28	4,210.66	1,788,402.51
Companies' not conceded affiliates:							
Utility Accountants and Tax Consultants	54,552.70	10,587.37	40,362.04	4,577.58	1,636.60	607.68	112,323.97
Transfer and Coupon Paying Agency	7,594.80	382.38	5,132.24		470.25		13,579.67
Financial & Securities Assistants	5,604.94	505.19	1,068.75	64.40			7,243.28
Daniel Starch & Staff							
E. J. Cheney	26,389.19	7,086.22	22,417.72	2,263.28	20.00	55.00	58,231.41
Utility and Financial Accountants, Inc.							
Utility and Financial Advertising Agency	11,818.83	8,730.83	4,635.44	888.66			26,073.76
H. C. Hopson & Company							
C. M. M. Corporation							
Day & Company [1]							
	105,960.46	27,291.99	73,616.19	7,793.92	2,126.85	662.68	217,452.09
	1,040,056.74	169,356.90	669,829.39	114,535.10	7,203.13	4,873.34	2,005,854.60

[1] Not Corporations.
[2] Nominee partnership for registration of securities.

84 7. Under date of March 6, 1936, the Federal Power Commission adopted an order pursuant to the provisions of Section 209 (b) of the Federal Power Act accepting the offer of the Public Service Commission of the Commonwealth of Pennsylvania to make available the services of certain employees of its staff without compensation for the purpose of assisting in the inquiry instituted by its order of January 6, 1936. Said employees of the Public Service Commission of Pennsylvania qualified as examiners of the Federal Power Commission and assisted in the accounting work thereafter undertaken in the inquiry and investigation.

8. Subsequent to the filing of returns by respondents under the order of January 6, 1936, accounting representatives of the Commission made a field examination and investigation to determine the accuracy of the returns as made and to develop information and data called for by the order of January 6, 1936, which had not been furnished by respondents. This field investigation was directed to an examination of the books, records, and accounts, not only of respondents and admitted affiliates, but also of alleged non-affiliates, insofar as they related to charges shown in respondents' returns. Access to the books, records, and accounts of so-called non-affiliates was denied because of their claimed status as non-affiliates—although apparently, the same persons exercised dominion and control over the books, records, and accounts of alleged non-affiliates and admitted affiliates alike. The books, records, and accounts of the alleged non-affiliates were apparently kept and maintained by the same force of employees, in
85 the same offices as were the books, records, and accounts of some of the admitted affiliates. Without full disclosure as to the nature of the charges emanating from these alleged non-affiliates as well as the cost of the service rendered and the necessity therefor, the Commission's representatives were not able to determine the accuracy or correctness of the books, records, and accounts of respondents.

9. The examiners of the Commission on December 10, 1936, submitted to the Commission a report, signed by Examiners Harry L. Osman and J. A. Wilhelm, setting forth the results of their examination and reporting that access to the necessary books, records, and accounts of the alleged non-affiliates had been denied them.

10. The examiners of the Commission further reported that the examination of the books, accounts, memoranda, and records of the respondents, and of certain other persons, disclosed transactions during the years 1934 and 1935 between the said respondents and the following additional persons not theretofore reported by the respondents; viz, H. C. Hopson, Edmund B. Naylon, Corporate Records and Secretarial Assistants, Day & Company, Associated Gas & Electric Properties, Associated Securities Corporation, Associated Gas & Electric Corporation, NYPANJ Utilities Company, Metropolitan Edison Company, Associated Electric Company, Central U. S. Utilities Company, Pennsylvania Electric Corporation, and J. I. Mange.

11. On January 26, 1937, the Federal Power Commission directed by interim order that a hearing be held on March 3, 1937, to ascertain and determine: (a) all facts, practices, and matters regarding the ownership, operation, management, and control of said respondents, or either of them; (b) all contracts and working arrangements between said respondents and any person who controls, di-
86 rectly or indirectly, said respondents or who is controlled by any such person; and (c) all expenditures and obligations incurred thereunder that in any way affect or relate to the business of said respondents or either of them.

12. By paragraph (b) of said order of January 26, 1937, the Commission directed in the form of subpoena duces tecum, that respondents, as well as other persons named therein (being persons who originated or made charges which were, directly or indirectly, reflected upon the books of said respondents), appear at the hearing and present for the record (for the years 1934, 1935, and to date) full and complete information as to the person or persons which controlled, directly or indirectly, the respondents and each of them and any of the other persons named therein which were directly or indirectly, under the same control as respondents or either of them; and, to assist the Commission in determining the facts as to the control of each person named therein, each such person was directed to present specific information and data at said hearing showing: (a) the form of its organization, i. e., whether individual, partnership, corporation, trust, or otherwise, under which such person exists; (b) the articles of incorporation, partnership agreement, trust agreement, and/or any other document or documents by which such person was created, formed, exists, or operates, as originally created and as subsequently changed, modified, amended, or otherwise altered; (c) the full name and address of each partner, director, officer, trustee, agent, or other individual elected, appointed, or authorized to act for such person under any circumstance whatsoever; (d) the ownership or interest, legal or beneficial, held by such persons, or any of them, in or over any other person named above, as well as the manner
87 or means by which such ownership or interest is accomplished and/or maintained; and (e) such other and further pertinent data or information relating to the matters under investigation, as may from time to time during the course of said hearing, be required by the Commission.

13. The order of January 26, 1937, also directed that a copy of the accounting report prepared by Harry L. Osman and J. A. Wilhelm, setting forth the results of their investigation and examination of charges reflected on the books of respondents be served upon respondents and all persons to whom the subpoena duces tecum was directed.

14. The order of January 26, 1937, further gave notice that the matters assigned for hearing would be heard by the Federal Power

Commission sitting jointly with the Public Service Commission of the Commonwealth of Pennsylvania.

A full and complete copy of the order of the Federal Power Commission, under date of January 26, 1937, is attached hereto as "Exhibit B" and by reference made a part hereof.

15. The interim order of January 26, 1937, assigning for hearing the matters therein specified, was duly served on respondents together with a copy of the accounting report submitted to the Commission by Messrs. Osman and Wilhelm.

16. Thereafter on February 23, 1937, petitioners filed with the Federal Power Commission their petition for rehearing. Said petition prayed the Commission to grant a rehearing upon its order of January 26, 1937, and, upon such rehearing, to vacate, set aside, and annul said order and terminate the proceeding instituted by its order of January 6, 1936.

88 17. By appropriate action, the Federal Power Commission on March 23, 1937, granted the petition for rehearing filed by respondents under date of February 23, 1937, and assigned for hearing on April 14, 1937, the matters involved in the proceeding. The minute of the meeting of the Federal Power Commission recording such action is attached hereto as Exhibit C.

18. The Acting Secretary of the Federal Power Commission on March 24, 1937, notified respondents of the action of the Commission in granting the petition for rehearing and assigning the matters involved in the proceeding for hearing on the 14th day of April 1937. The notice given by the Acting Secretary to respondents was as follows:

"Notice is hereby given that the Federal Power Commission, on March 23, 1937, granted the petition for rehearing filed in the above matter by the respondents, Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, and assigned the matters involved in this proceeding for hearing in the hearing room of the Commission in Washington, D. C., on the 14th day of April 1937, at 10 a. m.

"By the Commission:

"LEON M. FUQUAY, *Acting Secretary.*"

19. Thereafter, on April 14, 1937, in accordance with the above notice, the Commission before its duly appointed examiner began the hearing which had been set by its order of March 23, 1937. At this hearing the petitioners were afforded an opportunity to introduce testimony in support of their petition for rehearing. At the conclusion of the petitioners' evidence, counsel for the Commission began the introduction of testimony. Almost immediately the petitioners objected to certain evidence sought to be introduced by counsel for the Commission, on the grounds that such evidence

89 had no bearing on the issues raised by their petition for rehearing. The examiner overruled most of the petitioners' objections to the evidence offered by counsel for the Commission and allowed such evidence to be introduced, permitting petitioners to note exceptions to rulings of the examiner. Before the counsel for the Commission had completed the introduction of evidence, and before the Commission had an opportunity to offer all the evidence which they considered as having direct bearing upon the issues involved in the hearing petitioners applied to this court for a Rule to Show Cause and Stay of Proceedings.

20. The evidence which was offered by counsel for the Commission at the hearing which commenced on April 14, 1937, and which was objected to by petitioners and allowed by the examiner to be made part of the record was evidence to establish the jurisdiction of the Commission over the petitioners and over the subject matter of the hearing and no evidence was offered by counsel for the Commission which was not material to the establishment of the jurisdiction of this Commission in the premises.

21. All hearings, investigations, and proceedings before the Commission under the Federal Power Act are governed by rules of practice and procedure adopted by the Commission. The Commission has complete authority under the Act to direct the procedure before it from the very inception of any proceeding, and there is nothing in the rules of practice and procedure adopted by the Commission pursuant to the Act which gives any party to any proceeding before the Commission the right to an appeal from an interim order of the Commission or from a ruling of an examiner. There is nothing in the Federal Power Act, the Judicial Code, or in any other statute which would permit any such appeal to any court.

90 22. Every right which petitioners have asserted in this court, if valid, has an adequate and appropriate remedy readily available in a court of original jurisdiction.

Wherefore, the Federal Power Commission prays:

That the Rule to Show Cause issued out of this Court on July 6, 1937, be discharged, the restraining order granted September 7, 1937, be dissolved, and the petition filed herein forthwith dismissed.

FEDERAL POWER COMMISSION,
By CLYDE L. SEAVEY, *Vice Chairman.*

OSWALD RYAN, *General Counsel,*
DOZIER A. DEVANE, *Solicitor,*
LAMBERT MCALLISTER, *Attorney,*
Attorneys for Federal Power Commission.

91 [*Duly sworn to by Clyde L. Seavey; jurat omitted in printing.*]

92 [Exhibit A to return omitted. Printed side page, 43 ante.]

94 [Exhibit B to return omitted. Printed side page, 47 ante.]

97 *Exhibit C to return*

IN RE INQUIRY AND INVESTIGATION OF METROPOLITAN EDISON COMPANY, ET AL.

IT–5015

Petition for rehearing granted and matters involved in this proceeding assigned for hearing

The Commission, having considered the matters involved in the inquiry and investigation instituted against Metropolitan Edison Company et al., Docket IT–5015, and the petition for rehearing filed therein by the respondents, Metropolitan Edison Company, Northern Pennsylvania Power Company, Pennsylvania Electric Company, Erie Lighting Company, The Clarion River Power Company, and Solar Electric Company, under date of February 23, 1937, grants said petition for rehearing and assigns the matters involved in this proceeding for hearing in the hearing rooms of the Commission in Washington, D. C., on the 14th day of April 1937, at 10 a. m.

The Secretary is directed to give notice to petitioners that the petition for rehearing has been granted and advise all parties in interest of the time and place of hearing.

[File endorsement omitted.]

98 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order staying proceedings

Filed Sept. 7, 1937

And now, to wit, September 7, 1937, after consideration of the application of Metropolitan Edison Company et al., after hearing and argument, it is

Ordered that the Federal Power Commission be, and it is hereby enjoined from proceeding with the hearing set by said Commission for September 14, 1937, in connection with the matters set forth in the petition in this case, until such time as this Court shall have determined the rule to show cause heretofore granted by this Court

on July 6, 1937, and the said rule granted July 6, 1937, and a full hearing on the merits are hereby set for hearing on October 4, 1937.

J. WARREN DAVIS, *Circuit Judge.*

[File endorsement omitted.]

99 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Minute entry of argument and submission

And afterwards, to wit, the 4th day of October 1937, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis, and Honorable John Biggs, Jr., Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 27th day of January 1938, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

100 In United States Circuit Court of Appeals, For the Third Circuit

No. 6447. October Term, 1937

METROPOLITAN EDISON COMPANY, NORTHERN POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, CLARION RIVER POWER COMPANY, AND SOLAR ELECTRIC COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petition for an Injunction Restraining the Federal Power Commission From Carrying on a Certain Investigation

Before BUFFINGTON, DAVIS, and BIGGS, Circuit Judges

Opinion

Filed January 27, 1938

DAVIS, Circuit Judge: The Public Service Commission of Pennsylvania instituted an inquiry and investigation into certain contracts and working arrangements which the petitioners and four other Pennsylvania corporations had with third parties. These other four corporations were not electric light or power companies. They were a bus company, a gas company, a water company, and a street
101 railway company and have now been dropped from these proceedings. The Pennsylvania Public Service Commission, here-

inafter called the Pennsylvania Commission, desired certain information in its investigation of the petitioners but could not secure it under the laws of Pennsylvania. The Governor and the Pennsylvania Commission called upon the Federal Power Commission, hereinafter called the Federal Commission, for assistance in securing the desired information. Thereupon the Federal Commission began an investigation of the petitioners in an effort to secure the information for use by the Pennsylvania Commission in its local or state problems.

Pursuant to its undertaking, the Federal Commission on January 6, 1936, made an "Order of Inquiry and Investigation of" the petitioners, the purpose of which was, the petitioners allege, to aid the Pennsylvania Commission in enforcing local law in regulating local affairs. The Petitioners filed answers to this order of January 6, 1936, challenging the jurisdiction and power of the Federal Commission to make the order.

Investigators or "accounting representatives" furnished the Federal Commission by the Pennsylvania Commission, made an accounting and report to the Federal Commission which thereupon made another order on January 26, 1937, directing the petitioners and thirty-three other companies to appear before it on March 3, 1937, in the Federal Commission's hearing room in Washington, D. C., for a hearing "to ascertain and determine all facts, conditions, practices, and matters regarding the ownership, operation, management, and control of said respondents or either of them; all contracts and working arrangements between said respondents and any person who controls, directly or indirectly, said respondents or who is controlled by any such person, and all expenditures and obligations
102 incurred thereunder that in any way affect or relate to the business of said respondents or either of them," etc.

The petitioners believing themselves aggrieved by the order, on February 23, 1937, petitioned the Federal Commission for a rehearing as provided in section 313 of the Act as a prerequisite for a court review. The petitioners raised two questions for the determination of the Federal Commission. They said that: 1. The Federal Commission did not have power to conduct an investigation for the sole purpose of supplying information to a State Commission for use in a proceeding designed to impose penalties under local law; and 2. The Federal Commission did not have jurisdiction over three of the petitioners because they operated entirely within the Commonwealth of Pennsylvania having no transmission lines, no interstate connections, transacting no business in interstate commerce and were not a "public utility" within the meaning of the Federal Power Act.

The day after the petition for rehearing was filed, the Federal Commission adjourned the hearing set for March 3, 1937, without day.

On March 24, 1937, the Federal Commission notified the petitioners that it had "granted the petition for rehearing * * * and assigned the matters involved in this proceeding for hearing in

the hearing room of the Commission in Washington, D. C., on April 14, 1937, at 10 A. M."

At the rehearing the petitioners offered evidence to show that three of them were not "public utilities" as defined by the Federal Power Act and that the purpose of the inquiry and investigation was to supply information to the Pennsylvania Commission for use in local proceedings designed to impose penalties under local, state law.

These were the only issues of fact raised by the petition and
103 the evidence of the petitioners. The Federal Commission, the petitioners allege, at the conclusion of the evidence of the petitioners over their vigorous objection, introduced evidence relating to the entire subject matter of the orders of January 6, 1936, and January 26, 1937, and in no way limited to the issues raised by the petition. They charge that the Federal Commission was continuing its investigation under the guise of conducting a rehearing for the purpose of determining the issues raised by the petition; that evidence was offered, for example, to show payments to various companies as far back as 1928, expenses incurred by petitioners in opposing the Wheeler-Rayburn Bill; charges for stationery and supplies; to show whether or not a foreign corporation (not one of the petitioners) was properly domesticated in Pennsylvania; the contents of minute books of foreign corporations other than the petitioners; what constitutes sound accounting practice; the business relations of persons other than petitioners with companies not claimed to be related to them in any way, etc.

They contend that the evidence introduced to establish these and other facts relates to the subject matter of the orders for the investigation of the petitioners and not to the issues raised in the petition for rehearing.

After the Federal Commission refused to change its course, a petition was filed in this court praying for an injunction to restrain the Federal Commission from thus continuing its investigation until it had determined the issues raised in the petition. The petitioners say that if the Commission is not restrained from continuing the investigation under the guise of a rehearing, the questions raised in the petition will be moot when the rehearing is completed and this court will be deprived of its appellate jurisdiction.

The Federal Commission says that:

104 1. This court does not have jurisdiction to review the Federal Commission's order of January 26, 1937, and,

2. If it does have such jurisdiction, the course pursued by the Federal Commission on the rehearing, if continued, was not such as to destroy the appellate jurisdiction of the court.

The Federal Commission contends that the so-called order of January 26, 1937, is really not an "order," but the mere notice of a hearing coupled with a subpoena duces tecum.

If this contention is true, the "Order of Inquiry and Investigation of Metropolitan Edison Company et al.," made on January 6, 1936, was a mere notice, for that one and the one of January 26, 1937, are

both called "order." Both begin and end in the same manner. After the declaratory parts, both orders continue with the mandate, "Now, therefore, it is ordered": in the one case, "That an investigation be, and the same is hereby instituted," and in the other, "That a hearing be held," etc. In both orders the petitioners are required to do definite things and to submit themselves to the further direction of the Federal Commission. The order has all the affirmative characteristics of a genuine order of the Federal Commission as we think it was intended to be, and constrained the petitioners to obedience at the risk of suffering severe penalties, civil and criminal, imposed by sections 315 and 316 of the Act.

The next technical question raised by the Federal Commission is that this order was not a final order and in consequence was not reviewable.

Section 313 (a) of the Act provides that. "Any person, State, municipality, or State Commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such
105 person, State, municipality, or State Commission is a part, may apply for a rehearing within thirty days after the issuance of such order. * * * No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon."

In order to preserve the right to a rehearing, it is necessary that application therefor shall be made within thirty days after the order was made and no proceeding to review it shall be brought unless application for a rehearing has been made. Implicit in this provision is the right to a review of "any order," final or interlocutory, by which any person is aggrieved if he makes application for a rehearing within thirty days.

Coming to the merits of the case, when the petition was filed and granted it was the plain duty of the Federal Commission to determine the issues raised in the petition. We are going to remand the case for such determination. In doing so the evidence admitted should be strictly confined to the two issues raised in the petition and not extended to the scope of the investigation proposed in the orders of January 6, 1936, and January 26, 1937. The relation of the evidence to the two questions involved should be apparent and logical and not far-fetched and remotely inferential. Some of the evidence admitted when the case was before the Federal Commission on rehearing was not relevant and material. If both sides will seek to produce only such evidence as is clearly admissible, we venture to hope that the determination of the issues will be speedy, final, and satisfactory.

In remanding the case, we express no opinion on the merits of the questions to be decided. The determination of them is for the Federal Commission under relevant and competent evidence. The Act has provided a review by this court of the orders of the Fed-
106 eral Commission and no order on the merits is now before us. These proceedings were taken so that the questions would not be moot if and when they come here.

The Federal Commission is restrained from proceeding with its proposed inquiry and investigation in accordance with its two orders of January 6, 1936, and January 26, 1937, until the questions raised in the petition for rehearing are determined by it.

Judge Biggs does not concur in this opinion as a whole and within a few days will file an opinion dissenting in part and stating his views.

A true Copy:

Teste:

_____,

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

107 In United States Circuit Court of Appeals, for the Third Circuit

[Title omitted.]

Dissenting opinion, concurring in part

Filed January 28, 1938

BIGGS, Circuit Judge: I think that I should make plain in what respects my opinion is in accord with or differs from that of the majority in the case at bar.

In August 1935, the Pennsylvania Public Service Commission commenced investigations of the petitioners and certain other
108 Pennsylvania corporations to ascertain facts in respect to their operating expense accounts and whether or not penalties should be imposed for certain alleged infractions of the Pennsylvania Utility Law. Certain phases of the investigation apparently could not be conducted adequately under the law of Pennsylvania and, at the request of the Pennsylvania Commission and the Governor, the Federal Power Commission, upon January 6, 1936, pursuant to Section 209 (b) and (c)[1] of the Federal Power Act (16 U. S. C. A. 824h) ordered an investigation of the petitioners.

The order of the Federal Power Commission of January 6, 1936, recited that full information concerning contracts, working arrangements, expenditures and obligations incurred by the petitioners was necessary to enable the Commission to determine whether the petitioners or other persons were violating the Federal Power Act, to

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[1] Sec. 209 (a) • • •

(b) The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this Act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

ascertain the effect of existing contracts for power upon the cost of production and transmission of electric energy by means of utility facilities under the jurisdiction of the Commission, and to aid
109 the Commission in the enforcement of the provisions of the Federal Power Act. Having made this order the Commission proceeded by its accountants to commence an investigation of the affairs of the petitioners and those corporations, copartnerships, or individuals allegedly connected with the petitioners. The petitioners permitted the examination by the Commission of the books and records of certain companies, conceding these companies to be affiliates, but refused to permit the examination of the books and records of certain other companies, copartnerships, and individuals because the petitioners would not concede them to be affiliates.

The accounting representatives of the Commission therefore prepared and submitted a report to the Commission which presented data allegedly tending to prove that certain named corporations, copartnerships and individuals controlled the petitioners and that these persons included both "conceded" and "non-conceded" affiliates of the petitioners. The Commission thereupon, on January 26, 1937, ordered a hearing and gave notice to these corporations, copartnerships and individuals to appear for examination before the Commission, with their books and records, to the end that the Commission might ascertain facts tending to prove or disprove the connection, or lack of it, of the "non-conceded" affiliates to the petitioners.

Section 313 (a) of the Federal Power Act (16 U. S. C. A. 8251 (a)) provides that any person aggrieved by order of the Commission may apply for a rehearing within thirty days after the issuance of such order. The subsection then states, "* * *. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon." Subsection (b) of Section 8251, provides
110 a method for the review of an order of the Commission. If the petitioners were to obtain a review of the order of January 26, 1937, it was necessary therefore that they file a petition for rehearing with the Commission as provided by the Statute. Accordingly upon the 23rd of February 1937, the petitioners filed a petition for rehearing with the Commission, alleging that the Commission was without jurisdiction of the petitioners or the subject matter in the investigation, that the investigation itself was being conducted for an improper purpose and in derogation of the Constitutional rights of the petitioners. The petition for rehearing further alleged that three of the petitioners, viz., Erie Lighting Company, Solar Electric Company, and The Clarion River Power Company, were not engaged in the transmission or sale of electric energy in interstate commerce and neither owned nor operated facilities for its transmission or sale. The petition prayed that the order of January 26, 1937, be vacated and the proceedings stayed pending the disposition of the petition for rehearing.

The petition for rehearing was in the nature of a motion to dismiss the proceeding for want of jurisdiction in the Commission. To attempt

a simile, it was as if a defendant in a suit at law had moved to dismiss a declaration upon the ground that the court lacked jurisdiction both of the parties and of the subject matter. No testimony had been taken; no hearings had been held by the Commission. The extent of the investigation upon the date of the filing of this petition consisted of an examination of books of certain companies by the accountants of the Commission.

Upon March 23, 1937, the Commission granted the petition for rehearing and assigned it for hearing upon April 14, 1937, and upon this date the hearing took place. The petitioners introduced
111 evidence to prove that the Commission had no jurisdiction over Erie Lighting Company, Solar Electric Company, and The Clarion River Power Company, that the investigation was being carried on by the Federal Power Commission for the purpose of aiding the Pennsylvania Commission. Evidence was then offered on behalf of the Commission pertaining to its jurisdiction to compel the production of books and records of alleged non-affiliates of the petitioners in order that the control of the petitioners might be established. Certain of this evidence related to the identification of charges over a period of years made by one company to another, to allocation of expenses in fighting the Wheeler-Rayburn Bill through the medium of a corporation designated as Utility Clearing Corporation, to questions of qualification of a foreign corporation, and to charges reflected on the books of divers companies during 1934, arising from billings for services, materials, donations, and expenses. Some of the testimony offered may or may not have been of evidentiary value and may or may not have tended to show the connections of the petitioners with alleged non-affiliates. Some of the testimony taken seems to have failed to meet the requirements of the technical rules of evidence, but it should be noted that the Commission is not bound by such rules.[2] In my opinion, however, the question of pertinency of the testimony offered before the Commission cannot be raised by the record now before us.

Abruptly, the proceedings before the Examiner were termi-
112 nated by the petition for injunctive relief filed in this court. The petitioners prayed that the Commission be enjoined from taking any further steps in respect to the issues raised by its investigation until the rehearing had been disposed of and to enjoin the Commission from introducing any evidence except such as might prove that Erie Lighting Company, The Clarion River Power Company, and the Solar Electric Company were in fact "public utilities" within the terms of the Federal Power Act. It will therefore be seen that the petitioners sought to limit the jurisdictional inquiry of the Commission to a very narrow ground and to require it to decide the jurisdictional question piecemeal. The Examiner refused to so limit

[2] Section 308 (b) of the Federal Power Act (16 U. S. C. A. 825g (b)) provides:
"All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act."

the inquiry and allowed questions of jurisdiction raised by the inquiry and investigation as a whole. The rule to show cause sought by the petitioners was granted by this court and thereafter a stay was given.

The petitioners contend that the Commission by an enlargement of the inquiry into questions of jurisdiction beyond those presented by their petition for rehearing jeopardize the appellate jurisdiction of this court, that by proceeding with the hearing and requiring evidence to be given concerning companies which are non-admitted affiliates, the Commission must render moot the question of the right of the Commission to require such information. The petitioners seek to enjoin such action by the Commission, and to this end, invoke the provisions of Section 262, the "all writs" section of the Judicial Code (28 U. S. C. A. 377).

It should be borne in mind that the Commission now seeks information in a public hearing, that at this stage of the proceedings the Commission has done nothing more than to require that named corporations, individuals, and copartnerships appear before it with books and records. The Commission has taken some testimony and
113 now seeks to receive further evidence tending to show or disprove connections and control of the petitioners by way of affiliation. All other questions aside, I think that this court should not hold that any individual, copartnership or corporation may refuse information germane to this administrative inquiry because of reliance upon the commerce clause or the Fifth Amendment. It may be the case that the disclosure of such information will result in charges based upon alleged violations of the laws of Pennsylvania, but I think that we cannot concern ourselves with this. It cannot be assumed that investigations of the Federal Power Commission constitute mere wanton meddling or are for a disguised purpose. We must assume that the purposes of the Commission's inquiry are of penetration into the intricate affiliations of the Associated Gas and Electric System as that System affects the public interest. Even if the whole of that System is not engaged in the transmission and sale of electric energy in interstate commerce, the authority of the Commission to conduct such investigation as in the case at bar is expressed in Section 311 of the Act (16 U. S. C. A. 825j),[3] and the powers of investigation
114 thus given to the Commission are fraught with the plainest public interest.

[3] Sec. 311. In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

The question presented to us, however, is a very narrow one. If this court has jurisdiction of the cause presented by the petition for review, it has such solely to the end that its appellate jurisdiction may not be destroyed or impaired. American Construction Co. v. Jacksonville T. & K. Railway Co., 148 U. S. 372, 379; Whitney v. Dick, 202 U. S. 132; McClellan v. Carland, 217 U. S. 268. This question in turn rests upon the question of whether or not the order of the Commission of January 26, 1937, and the proceedings thereunder are by their nature subject to review. The majority opinion of the court holds the order of the Commission reviewable. From this ruling I must respectfully dissent.

Whether or not the order of January 26, 1937, be in fact an order of inquiry regularly entered before a hearing of the Federal Power Commission or whether it be of the nature of a mere subpoena duces tecum, it is not a final order entered after hearing and finding of fact and is procedural and interlocutory in its nature, and therefore, if the investigation proposed by the order is proceeded with, the appellate jurisdiction of this court will not be destroyed.

Subsection (b) of Section 313 of the Federal Power Act (16 U. S. C. A. 825l (b)) provides:

"(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located, or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

115

he Commission may modify its findings as to the facts by reason of he additional evidence so taken, and it shall file with the court such odified or new findings which, if supported by substantial evidence, hall be conclusive, and its recommendation, if any, for the modifica- ion or setting aside of the original order. The judgment and decree f the court, affirming, modifying, or setting aside, in whole or in art, any such order of the Commission, shall be final, subject to review y the Supreme Court of the United States upon certiorari or certifi- ation as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

16 The order of January 26, 1937, is merely an interlocutory of procedural order. The Commission, pursuant to Section 208 of he Act, heretofore referred to, prescribes its own rules of procedure nd must itself pass upon the propriety of the evidence offered and s admissibility. For this court to pass upon such questions during he pendency of a hearing before the Commission is to compel us in ffect to sit with the Commission throughout every phase of its nquiry. If such a view be adopted the appellate court, as in the case t bar, in limine may be called upon to determine the jurisdiction of he Commission over the inquiry it seeks to conduct, to pass upon all uestions of evidence offered in the course of the investigation and pon the pleadings, all before the determination of any final issue by he Commission. The result would be precisely similar to that which ould come to pass if a review would lie to an appellate court from very ruling or order of a trial court, no matter whether interim, nterlocutory, procedural or final. The hearings before the Com- ission would be subjected to interminable interruptions by peti- ons for review to the Circuit Courts of Appeals to determine the gality of every order made by the Commission. Such a result nevitably would emasculate the Federal Power Act and render the ommission unable to pass upon the very matters for which it was reated, matters greatly affecting the public interest. In my opinion uch a result would be intolerable.

Moreover the language of Section 313 of the Act does not lend itself such a conclusion. Subsection (b) uses specific language which ompels an opposite interpretation. That subsection states that the finding of the Commission as to facts "* * * if supported

17 by substantial evidence, shall be conclusive." This language is substantially similar to that used by Congress in sections of he laws providing for reviews from similar administrative and quasi- udicial tribunals. The subsection further speaks of the right of a arty to a proceeding to adduce additional evidence upon a showing the court of appeals that such evidence is material to the issues. It rovides that the Commission may modify its findings as to the facts y reason of such additional evidence. These provisions plainly indi- ate that findings of fact shall be made by the Commission and that rders based thereon are subject to review. Subsection (b) speaks of

the "transcript of the record" to be certified to the Court of Appeals. Such a phrase used in its ordinary connotation indicates the record as a whole upon which the findings of the court below are based. In the case at bar there is neither transcript of record nor findings of fact. Further the use of the word "rehearing" in subsection (a) plainly presupposes that prior hearings have been had and that findings of fact have been made by the Commission upon which an order final in nature has been based.

The right of an inferior court to try a case submitted to it, undisturbed by interference from an appellate tribunal, is established beyond any question. Bank of Columbia v. Sweeney, 1 Pet. 567, 569; The Life and Fire Insurance Company of New York v. Adams, 9 Pet. 573, 602; American Construction Company v. Jacksonville T. & K. Railway Company, supra; Dooley Improvements, Inc. v. Nields, District Judge, 72 F. (2d) 638; Raritan Copper Works v. Elliott, 271 F. 284.

In the case at bar there is no order which is the equivalent of "a judgment entered upon a state of facts," as in the case of
118 American Sumatra Tobacco Corp v. Securities and Exchange Commission, — F. (2d) —. The similarity between the review provisions of the Federal Power Act and the Securities Exchange Act should be noted.

In the case of Minneapolis Chamber of Commerce v. Federal Trade Commission, 280 F. 45, the Circuit Court of Appeals for the Eighth Circuit, passed upon the right of the appellate court to review a preliminary order of the Federal Trade Commission. As in the case at bar it was contended by the petitioner that the Commission was without jurisdiction both of the parties and the subject matter. In dismissing the petition for want of jurisdiction, the court stated: "What is really sought by petitioners is that this court should halt inquiry at the threshold, exercising, in effect, the powers of a court of original jurisdiction in which a cause is pending, to rule in limine upon the propriety of the action and whether it should proceed further. The procedure invoked is similar, in effect, to that prevailing in a court of original jurisdiction, which has control of the successive steps of pleading, practice, trial, and final judgment or decree. But it must be remembered that this court has no original jurisdiction of this nature. Its functions, under the act before us, are confined to a review of certain acts of the Federal Trade Commission, which are specifically defined by the Congress. This act creates powers not otherwise conferred upon Circuit Courts of Appeals, and such courts are limited strictly to the powers thus specified. It was not intended that the Circuit Courts of Appeals should be drawn into original conduct of these investigations. If this court is to exercise preliminary power and control in determining at the outset what party shall be dealt with, what investigation shall be made, and what recom-
119 mendation submitted, then it has in effect been constituted an original tribunal of controversies of this nature. This was in

nowise contemplated, nor would it comport with the legitimate practical functions of a court of this nature."

The provisions of Section 313 of the Federal Power Act are very similar to those of the Interstate Commerce Act. The latter Act confers original jurisdiction upon the district courts of the United States of "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." (June 18, 1910, c. 309, Section 1, 36 Stat. 539; March 3, 1911, c. 231, Section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219 (28 U. S. C. A. 41, subdivision (28)).) In the leading case of United States v. Illinois Central R. R. Co., 244 U. S. 82, the Supreme Court reversed an order of a district court setting aside a procedural order of the Interstate Commerce Commission. The order of the Commission referred to set a cause for hearing at a specified time and place. The Supreme Court in its opinion stated: "The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and, it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in Proctor & G. Company v. United States—one which constrained the Railroad Company to obedience, unless it was annulled or suspended by judicial decree."

The powers of the Federal Power Commission are clearly defined by the Federal Power Act. Such powers expressly include the right to prohibit the issuance of securities or assumption of liability by a utility; to declare rates and changes of utilities to be unjust
120 and unreasonable; to approve or disapprove the sale or lease of utility facilities; and to determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. Orders, final in their nature, entered by the Commission after hearing and findings of fact, in the premises indicated, are subject to the review of the Circuit Courts of Appeals. Other orders, interim, procedural, or interlocutory, are not so reviewable. To hold otherwise, in my opinion, would constitute an unwarranted invasion of the powers of the legislative and executive branches of the Government.

In view of the foregoing it follows that the appellate jurisdiction of this court is in no wise jeopardized or impaired by the order of the Commission of January 26, 1937, or the proceedings of the Commission thereunder, and that therefore the provisions of Section 262, the "all writs" section, of the Judicial Code, cannot be invoked successfully by the petitioners.

I therefore concur in the majority opinion of the court only to the extent that it permits the resumption of hearings upon the petition for rehearing, but I nowise concur in and dissent from the ruling that the inquiry by the Commission upon the petition for rehearing must be limited as sought by the petitioners. In my opin-

ion this court is without jurisdiction to restrain or in anywise interfere with the proceedings now before the Commission, and will remain so until some order of the nature of a judgment entered upon a state of facts be made by the Commission and a review thereof is sought. Until such time the Commission must be permitted to proceed with its investigation undisturbed by the mandates of this court precisely as an inferior court would be allowed to proceed with the trial of a pending cause. The petition filed herein should be dismissed.

121 In view of the great public interest in the questions presented by the case at bar and the gravity of the court's decision, this dissent is written, as stated by Judge Woolley in General Electric Co. v. DeForest Radio Company, 44 F. (2) 931, 946, "with the hope that it will arrest the attention of the reviewing court."

A true Copy:
Teste:

_____,
Clerk of the United States Circuit Court of Appeals for the Third Circuit.

122 In United States Circuit Court of Appeals for the Third Circuit

No. 6447. October Term, 1937

METROPOLITAN EDISON COMPANY, NORTHERN POWER COMPANY, PENNSYLVANIA ELECTRIC COMPANY, ERIE LIGHTING COMPANY, CLARION RIVER POWER COMPANY, AND SOLAR ELECTRIC COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

Judgment

Filed Jan. 27, 1938

This cause came on to be heard on the transcript of record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that this cause be remanded to the Federal Power Commission for determination in accordance with the opinion of this Court, and that the said Federal Power Commission be restrained from proceeding with its proposed inquiry and investigation in accordance with its two orders of January 6, 1936, and January 26, 1937, until the questions raised in the petition for rehearing are determined by it.

Philadelphia, January 27, 1938.

J. WARREN DAVIS, *Circuit Judge.*

[File endorsement omitted.]

123 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Order that opinion heretofore filed be considered as the findings of fact and conclusions of law

Filed Mar. 7, 1938

The opinion as filed by this Court on January 27, 1938 shall stand as the findings of fact and conclusions of law required under Rule 70½.

Philadelphia, March 7, 1938.

J. WARREN DAVIS, *Circuit Judge.*

[File endorsement omitted.]

124 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Motion to complete record

Filed March 7, 1938

Now comes the Respondent, Federal Power Commission, by its attorneys and represents to the Court:

First, That Equity Rule 70½ (28 U. S. C. A. 723) requires that "the Court of first instance shall find the facts specially and state separately its conclusions of law thereon."

Second, That the Court has not set forth, upon the record in this cause, findings of fact specially and has not stated separately its conclusions of law thereon.

Wherefore, Respondent moves that the record in this cause be completed as required by Rule 70½, that the Court find the facts specially and state separately its conclusions of law thereon, or, if the Court intends that its opinion as filed on January 17, 1938, stand as such findings of fact and conclusions of law that such an order be entered.

Respectfully submitted.

OSWALD RYAN, *General Counsel,*
LAMBERT MCALLISTER, *Attorney,*
WILLIAM C. KOPLOVITZ, *Attorney,*
Attorneys for Respondent,
Federal Power Commission.

125 WASHINGTON, D. C., *March 3, 1938.*

SAUL, EWING, REMICK & SAUL,
2301–17 Packard Building, Philadelphia, Pennsylvania.

Please take notice that the above motion will be presented to the Court for consideration at 10 a.m. on March 7, 1938, or as soon thereafter as counsel for Respondent may be heard.

OSWALD RYAN, *General Counsel.*

WASHINGTON, D. C. *March 3, 1938.*

[File endorsement omitted.]

126 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1938

Supreme Court of the United States

Order allowing certiorari

Filed April 28, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is assigned for argument on May 2, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice ROBERTS took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1938